CONSTITUTIONAL CONVENTION

BULLETIN NO. 7

Eminent Domain and Excess Condemnation

Compiled and Published by the

LEGISLATIVE REFERENCE BUREAU

Springfield, Illinois

[Printed by authority of the State of Illinois.]

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I. SUMMARY.

The purpose of this pamphlet is:

(1) To present a summary of the constitutional aspects of the law of eminent domain in Illinois.

(2) To indicate the changes which were introduced in the constitution of 1870.

(3) To compare the law of eminent domain in Illinois with the law in other states.

(4) To indicate the questions which have arisen out of existing constitutional provisions and which are likely to come before the convention.

(5) To discuss recent constitutional changes in the law of eminent domain which have been adopted in other states.

There are, in general, two types of questions likely to come before the Convention: (1) those which have arisen out of existing constitutional provisions, (2) those which involve an extension of the power of eminent domain.

In the first group the following questions may arise: The question of the advisability of amending the general eminent domain clause,

(1) So that all governmental agencies which possess the power of eminent domain may be permitted to set off benefits to the portion of land not taken for the improvement in diminution of the value of the part of the tract which was taken.

(2) So that the General Assembly will possess the power of authorizing the condemnation of the rights of private property owners acquired under restrictions as to use imposed upon property dedicated to public uses.

(3) By eliminating the constitutional guaranty of jury trial on issues of compensation.

(4) By eliminating the constitutional provision which prevents the General Assembly from authorizing railroad companies to condemn the fee in land taken for railroad tracks.

(5) So that in all cases it will be certain that the General Assembly may authorize the taking of a fee.

In the second group of constitutional questions the following may arise:

The question of the advisability of authorizing:

(1) The condemnation of land for the conservation of all natural resources.

(2) The condemnation and leasing of public utilities by municipalities.

(3) The condemnation of land for purposes of reclamation.

(4) The condemnation of land for the purpose of abating slum areas.

(5) The condemnation of land for the purpose of relieving congestion and in furtherance of housing projects.

(6) The use of excess condemnation for the purpose of: (a) facilitating the union of lot remnants left by street openings with adjoining property so as to form suitable building sites; (b) protecting an improvement by taking and selling land, bordering on an improvement, under restrictions as to the type, use and location of buildings; (c) recouping the cost of an improvement by taking and selling land bordering on an improvement after it has increased in value.

(7) Closely related to the question of authorizing excess condemnation for the purpose of protecting an improvement is the question of the advisability of authorizing municipalities to enact zoning ordinances and ordinances prohibiting the erection of billboards in certain districts.

II. CONSTITUTIONAL PROVISIONS RELATING TO EMINENT DOMAIN.

Text of constitutional provisions. The text of the eminent domain clause under the constitution of 1818 was as follows: "Nor shall any man's property be taken or applied to public use without the consent of his representatives in the general assembly, nor without just compensation being made to him."

This language was continued without change in the constitution of 1848. The clause underwent important changes in the constitution of 1870. The general clause now provides: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken."[1]

Separate sections were inserted which deal with the right to condemn land for roads for private and public use, for drainage purposes and with the condemnation of property and franchises of corporations: "The general assembly may provide for establishing and opening roads and cartways, connected with a public road, for private and public use."[2] "The general assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others."[3] As amended in 1878 the section last quoted reads: "The general assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby."[4]

The provision relating to the condemnation of corporate franchises reads: "The exercise of power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the General Assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity the same as of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when,

[1] Art. II, Sec. 13.
[2] Art. IV, Sec. 30.
[3] Art. IV, Sec. 31.
[4] Art. IV, Sec. 31.

in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right."[5]

Changes introduced by Constitution of 1870. It thus appears that the constitutional convention of 1869-70 introduced several important changes in the law of eminent domain, as it existed under the constitutions of 1818 and 1848. A short statement here follows concerning the effect, in general, of these new provisions.

(1) A constitutional right to compensation was given in cases where property has been damaged. Before 1870 the right to compensation was confined to cases of actual takings. A taking was held to mean a taking of the fee, or the taking of an easement or the imposition of an additional servitude upon land an easement in which previously had been acquired, and in addition, included all direct physical injuries to property such as the overflowing of land. Compensation was not required to be paid for non-physical injuries, such as resulted from a change in the grade of streets or from the construction of a railroad upon a street, the fee of which was in the public. The introduction of the damage clause gave a right to compensation in these cases. Stated generally, an owner whose property has been damaged under legislative authority and under color of eminent domain has, under the constitution of 1870, a right to compensation to the same extent as he has against private persons. Illinois was the first state to introduce this change. This example has been followed in about half of the states, most of which are Western states. This change in the law appears to have given satisfaction, for there is to be found but little evidence of a desire to return to the earlier rule, which is still in force in most of the Eastern states, under which property may be damaged without compensation.

(2) The guaranty of the right to compensation for damage to property has had an additional effect in this state which was not a necessary consequence of the introduction of the damage clause. Under the constitutions of 1818 and 1848, in determining the amount of compensation for land actually taken, it was held that elements of special benefit to that part of the claimant's land which had not been taken could be set off against the value of the part taken. Without pointing out any specific reason, the court has held that the effect of the constitution of 1870 was to prevent the set-off of benefits against the value of land taken, although the court has never had the opportunity of passing upon a statute which undertook to restore the rule as it was under the earlier constitutions. In takings by private corporations this rule is followed in the great majority of the states, but in about half the states, either as the result of judicial construction of clauses similar to the Illinois provision, or because of express constitutional provision, set-off of benefits to remaining land against the value of the part taken is allowed in takings by the state and by its agencies.

[5] Art. XI, Sec. 14.

If all agencies of the state possessed the power of levying special assessments, the rule forbidding set-off would be of little consequence. But in Illinois where cities, towns, villages, park districts and drainage districts are the only agencies which may levy special assessments, there is strong argument in favor of allowing all governmental agencies, such as counties, school and road districts and the Department of Public Works and Buildings, the right to set off benefits against the value of the land taken.

(3) The guaranty of jury trial to determine the amount of compensation came into the constitution of 1870. Under the first two constitutions, the General Assembly had power to and did provide other means for the ascertainment of compensation, for the general constitutional guaranty of jury trial was never construed to apply to eminent domain proceedings. The provision relating to jury trial as to compensation is found only in about one-third of the states, and in some of these only in cases of appeal from a finding of some other body. In about half of these states the provision does not apply to takings by municipal corporations. The provision has been the subject of some criticism in other states.

The state is expressly exempted from this provision in Illinois. This exemption applies to all takings by the state in its corporate capacity, such as takings by the Department of Public Works and Buildings, but does not exempt local governmental agencies.

(4) Under the constitutions of 1818 and 1848 there was no constitutional limitation upon the power of the general assembly to authorize the condemnation of the fee simple title to land. The constitution of 1870 provided that the fee of land taken for railroad tracks should remain in the owner. Such a limitation as this is found in the constitutions of but three other states, Missouri, Oklahoma, and South Dakota. Since the abandonment of the user causes a reversion of the right of possession to the owner of the fee, this provision works a hardship on railroad companies in the event of a necessary removal of their tracks. In cases where the removal of tracks is sought by a city in furtherance of its improvement plan, the provision becomes an obstacle. The elimination of this restriction has been urged by civic bodies in Chicago, interested in the Chicago Plan. If the provision is taken out it would seem that the roads should also be given the right to condemn the fee of lands now occupied by them in which they had previously acquired easements under the existing constitution.

(5) The constitution of 1870 also contains a provision not found in the preceding constitutions, expressly declaring that the franchises and properties of corporations shall be subject to condemnation for public use. The provision also reasserts the guaranty of jury trial in eminent domain proceedings by or against corporations. This provision is found in about one-third of the states. Inasmuch as it has been held that the power of eminent domain cannot irrevocably be granted away and that a breach of an attempt to do so is not an impairment of the obligation of any contract, this provision adds no power to that possessed under the general eminent domain clause.

While the Supreme Court of Illinois has definitely stated that the clause adds nothing, its elimination might possibly be construed as manifesting a real intention to affect the law in some way.

(6) The convention of 1870 also extended the meaning of the term "public use" to include two purposes, primarily private, by inserting provisions authorizing the condemnation of land for roads for private and public use, and for drainage purposes. Under the prior constitution, it had been held that the General Assembly could not authorize the taking of land for private rights of way, and probably would have held, had the question been presented, that the taking of land for drainage purposes was not a public use. Provisions of a similar character relating to roads are found in about one-third of the states. The drainage provision is also found in about the same number of states. The drainage section was amended in 1878 so as to permit the construction of levees, the construction of drains for sanitary and mining purposes, the organization of drainage districts and the levying of special assessments to meet the cost of such works.

III. CONSTRUCTION OF THE EMINENT DOMAIN CLAUSES.

What constitutes a public use. Property cannot be taken except for public use. To constitute a public use the property must be employed so as to render a substantial benefit to a relatively large group of persons.[1] There are four types of cases. (1) Property may be taken by the state or by its public or municipal corporations for the purpose of housing the various departments and agencies of government.[2] (2) Property may be taken for the purpose of enabling the state or its agencies to carry out its functions of government, such as would be in the interest of trade, commerce, navigation, public health, safety and general welfare. Accordingly land may be taken for the improvement of navigation,[3] for jails,[4] public hospitals, public schools, public parks,[5] roads and streets,[6] forest preserves,[7] and for the carrying on of any business legally conducted by the state or by its agents.[8] The Attorney General has given an opinion that the state has power to take over the coal mines in times of emergency such as were brought on by war conditions.[9] (3) Property may be taken by private corporations if the use to which the property is to be devoted is of a character such that the public have the legal rights to demand some service. Land may under authority of statute be taken by railroad companies and other public utilities to enable them to carry on such business.[10] Public grist mills come within the rule.[11] (4) In a limited number of cases, under express constitutional provisions, land may be taken for uses which in the absence of constitutional provision may have been regarded as private, such as for roads for public and private use[12] and for drainage purposes.[13]

But few cases have been presented in this state where the court has ruled that a use is not public. It has been held, in the following cases, that the proposed use was not public: the taking of a right of way by a coal mining company,[14] the taking of land for a mill of which

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[1] C. C. C. & St. L. Ry. Co. v. Drainage District, 213 Ill. 83 (1904).
[2] Deneen v. Unverzagt, 225 Ill. 378 (1907).
[3] Beidler v. Sanitary District, 211 Ill. 628 (1904). Opinions of the Attorney General, 1908, p. 85.
[4] County of Mercer v. Wolff, 237 Ill. 74 (1908).
[5] Village of Depue v. Bauschenbach, 273 Ill. 574 (1916).
[6] Chicago v. Lord, 276 Ill. 549, 277 Ill. 407 (1916, 1917).
[7] Perkins v. Commissioners of Cook Co., 271 Ill. 449 (1916).
[8] Helm v. Grayville, 224 Ill. 274 (1906).
[9] Opinions of the Attorney General, 1917-18, p. 606.
[10] L. S. & M. S. R. R. Co. v. C. & W. I. R. R. Co., 97 Ill. 506 (1881).
[11] Gaylord v. Sanitary District, 204 Ill. 576 (1903).
[12] Const. 1870, Art. IV, Sec. 30.
[13] Const. 1870, Art. IV, Sec. 31.
[14] Scholl v. German Coal Co., 118 Ill. 427 (1887).

the public had no right to demand a service,[15] under the constitution of 1848, the taking of land for a private road,[16] and the taking of land by a railroad for a side track to a manufacturing plant for the sole purpose of transporting the products of the plant.[17]

Condemnation of property already devoted to public use. It is well established that property already devoted to public use is still subject to condemnation for other public uses. The question of the propriety of authorizing the condemnation of such property is primarily a legislative question, but is subject to judicial review.[18] Where the legislative grant of the power of eminent domain is general, the condemnation of property already devoted to public use will be upheld only when the court finds that the new use will be a different use, not necessarily different in kind but in degree, by which the public obtains some additional advantage. Extensions of streets across railways,[19] and railways across streets,[20] and across other railways[21] constitute new uses. A railroad may condemn land belonging to another railroad which is not devoted by the latter to railroad purposes,[22] or even a part of the tracks of another railway for a short distance,[23] but cannot condemn a considerable portion of the right of way.[24] A city sewer may be constructed through land devoted to public uses by a sanitary district.[25] But a general grant of the power of eminent domain to a city does not authorize the condemnation, by the city, of a strip of land through a county poor farm,[26] nor the condemnation of a part of a library building for a city street.[27] The taking of property already devoted to public use does not impair the obligation of any contract.[28]

There is one special problem which has arisen in this state with reference to the power to condemn land dedicated to public use. A portion of what now comprises Grant Park in the city of Chicago was dedicated by the Canal Commissioners to the public. The plat designated the lake front strip as "open ground, no buildings". Another portion was dedicated by the United States and the plat similarly stated "public grounds forever to remain vacant of buildings." These dedications were duly accepted by the City of Chicago.

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[15] Gaylord v. Sanitary District, 204 Ill. 576 (1903).
[16] Nesbit v. Trumbo, 39 Ill. 110 (1866). Art. IV, Sec. 30, Constitution of 1870, expressly allows the taking of land for roads for private and public use.
[17] C. & E. I. v. Wiltse, 116 Ill. 449 (1886).
[18] People v. Walsh, 96 Ill. 232 (1880); L. S. & M. S. R. R. Co. v. C. & W. I. R. R. Co., 97 Ill. 506 (1881).
[19] C. R. I. & P. R. R. Co. v. Lake, 71 Ill. 333 (1874); C. & A. R. R. Co. v. Pontiac, 169 Ill. 155 (1897).
[20] M. City Ry. Co. Chi. W. D. Ry. Co., 87 Ill. 317 (1877).
[21] E. St. L. & C. Ry. Co. v. B. C. Ry. Co., 159 Ill 514 (1896); I. C. R. R. Co. v. C. B. & N. R. R. Co., 122 Ill. 473 (1887).
[22] W. D. Ry. Co. v. El. R. R. Co., 152 Ill. 519 (1894).
[23] L. S. & M. S. R. R. Co. v. C. & W. I. R. R. Co., 97 Ill. 506 (1881).
[24] Central Ry. Co. v. Fort Clark H. Ry. Co., 81 Ill. 523 (1876).
[25] Chicago v. Sanitary District, 272 Ill. 37 (1916).
[26] Edwardsville v. Madison, 251 Ill. 265 (1911).
[27] Moline v. Greene, 252 Ill. 475 (1911).
[28] Hyde Park v. Cemetery Association, 119 Ill. 142 (1886); West River Bridge Co. v. Dix, 6 How. (U. S.) 507; Long Island Water Supply Co. v. Brooklyn, 166 U. S., 685.

The general assembly of Illinois subsequently authorized the condemnation of the easements thus created and possessed by the owners of the property abutting on the park, and authorized the erection therein of a museum. The court held[29] that the General Assembly had no power to authorize the condemnation of these easements because the land had been accepted under these restrictions, although the general holding is that property already subjected to public use can be condemned for other uses, and that the state cannot irrevocably barter away its power of eminent domain, and that the breach of any agreement not to exercise the power of eminent domain does not impair the obligation of any contract.[30] The decision was not expressly based upon the ground that the proposed new use was not public but was based upon the broad proposition that the state, having accepted the land with the restrictions, could not rid itself of them for any purpose. Three of the members of the court dissented. The precise point has apparently not arisen elsewhere. In view of the probability that the needs of the state may often demand a change in the use of property dedicated under restrictions, this decision may prove of difficulty.

Power to condemn fee in land. Under existing statutes in Illinois it appears to be true that the power of eminent domain may not be exercised by local communities for the purpose of condemning the fee of land. Several of the decisions upon this matter seem to squint at a notion that there is a constitutional protection in the individual not to be deprived of a fee if less than a fee may be regarded as sufficient to meet the public need. Some constitutional basis for this view seems to be implied in the case of Tacoma Safety Deposit Co. v. Chicago,[31] although the real basis of the court's decision will be found on page 197: "This property was condemned in 1851, and at that time there was no statute in force in this state expressly authorizing a city to take the fee of real estate for street purposes, and we think the law is clear that before the city could acquire the fee to said real estate for street purposes, it must appear there was a statute in force which, by its terms, or by necessary implication, authorized the city to take said property in fee for the purpose of widening said street".

A similar statement will be found in the case of Miller v. Commissioners of Lincoln Park,[32] and in the case of Lockie v. Mutual Union Telegraph Co.[33]

The actual decisions so far upon this matter have been based upon purely statutory grounds, and have construed a right to condemn conferred by statute as a right to condemn a user only. Of course, it

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[29] South Park Commissioners v. Ward, 248 Ill. 299 (1910). Dictum to the contrary in L. & N. R. R. Co. v. Cincinnati, 76 Ohio St. 481.

[30] Village of Hyde Park v. Cemetery Association, 119 Ill. 142 (1886); Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685; West River Bridge Co. v Dix, 6 How. 507.

[31] 247 Ill. 192 (1910).

[32] 278 Ill. 400 at page 407 (1917).

[33] 103 Ill. 401 (1882).

is possible that the court, having taken this view, might at some time if the constitution is left unchanged, take the further step of saying that the words "public use" are to be limited to the taking of only such an interest in the property as is essential for the purpose. On the analogous questions of the necessity for a particular taking and of the amount of land needed, it has been held that these questions are for the court, although the condemning authority possesses a wide discretion in these matters.[34] In other states it is held that the fee may be taken.[35]

The only express constitutional limitation in Illinois upon the power of the general assembly to authorize the taking of the fee in lands is the unusual provision, found in Art. II, Sec. 13, which declares that the fee of lands taken for railroad tracks shall remain in the owner. This restriction upon railroads is found only in the constitutions of three other states, Missouri, Oklahoma and South Dakota.

It has been urged that this restriction upon railroads is unjust because the effect of an abandonment of an easement or of its use for a purpose other than the one for which it was condemned causes a reverter[36] to the owner or to his heirs. In its report on excess condemnation, the Chicago Bureau of Public Efficiency in urging the elimination of this clause, states:

"There is a public interest in this matter in connection with city planning. One of the aims of Chicago City planners is to secure a rearrangement of railroad terminals in Chicago which would permit of the abandonment for railroad use of considerable railroad property. It would seem that the constitution should provide that the railroads, after having made use of property in good faith for railroad purposes for a specified number of years, should retain title and have the power to sell it and retain the proceeds in case the city authorities agree and it is no longer needed for railroad purposes."

Taking and damaging of property. The constitutions of 1818 and 1848 required the payment of compensation only when property was taken or applied to public use. The word "applied" seems not to have been construed, nor to have added anything to the word "taken". The taking of title or of an easement clearly came within the protection of the clause. Additional servitudes upon land constituted a taking. The typical cases arose where a city street, the fee of which was in the abutter, was used for railroad purposes,[37] or for telegraph or telephone lines.[38] Street railways were held to be but a natural use of the street and therefore did not constitute an additional servitude.[39] Where the fee of the street was in the city, the property

[34] Chicago v Lehman, 262 Ill. 468 (1914).
[35] Attorney General v. Williams, 174 Mass. 476; Dingley v. Boston, 100 Mass. 544; Fairchild v. St. Paul, 46 Minn. 540.
[36] Bell v. Mattoon Waterworks Co., 245 Ill. 544 (1910); Sullivan v. Atchinson, etc. R. R. Co., 251 Ill. 108 (1911); C. & E. I. R R. Co. v. Clapp, 201 Ill. 418 (1903).
[37] I. B. & W. R. R. Co. v. Hartley, 67 Ill. 439 (1873); Wilder v. Aurora Traction Co., 216 Ill. 493 (1905).
[38] Board of Trade Tel. Co. v. Barnett, 107 Ill. 507 (1883); Burrall v. Am. Tel. Co., 224 Ill. 266 (1906).
[39] C. B. & Q. R. R. Co. v. West Chicago Street R. R Co., 156 Ill. 255 (1895).

could be put to any use without compensating abutting owners for resulting damage sustained by them.[40] For injuries to rights in land, which did not constitute a technical taking, there was a right to compensation whenever the invasion of the natural right produced a direct and physical injury to property, such as the overflowing of the owner's land.[41] In many jurisdictions the word "taken" was given a more restricted meaning. Under the Illinois rule the property owner was given some right to compensation for consequential damage, but since this right was limited to direct and physical injuries, his rights were not coextensive with his rights against private persons at common law. There was one apparent exception to the rule that consequential injuries to property did not constitute a taking. Where a part of a tract was taken and the part not taken was injuriously affected, it was held that the entire injury, measured by the difference between the fair cash market value of the part not taken before and after the taking, plus the fair cash market value of the parcel taken, was a taking.[42] This rule has remained unchanged under the constitution of 1870.[43]

The primary reason for a change in the Constitution of 1870 was to give the owner, no part of whose land was taken, a right to recover compensation for injuries of a non-physical character. This change was accomplished by the introduction of the word "damage". Illinois was the first state to adopt this change. As the provision now reads: "Private property shall not be taken or damaged for public use without just compensation."

Provisions of like nature have now been adopted in Arizona, Arkansas, California, Colorado, Georgia, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. In some states where the constitution does not provide for a right to compensation for the damaging of property the right is conferred by statute. In Massachusetts this practice has prevailed for many years. In some cases the statutory right to damages goes beyond the requirement of any constitutional provision, as for example, in Massachusetts and New York, where land is taken and submerged for the purpose of creating a water supply, statutes authorize the recovery of damage to business conducted on land taken.[44] In such cases the prevailing rule is that the owner is limited to the market value of his land.[45]

Some difficulty has been encountered in defining the word "damage" in this new constitutional sense. The court had three alternatives open: (1) It might have held that the effect of the change was to impose the same degree of liability for damage inflicted under legislative authority, as had always been imposed at common law upon

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[40] Moses v. P. R. R. Co., 21 Ill. 516 (1859); Murphy v. Chicago, 29 Ill. 279 (1862).

[41] Nevins v. Peoria, 41 Ill. 502 (1866).

[42] State v. Evans, 3 Ill. 208 (1840); Curry v. Mt. Sterling, 15 Ill. 320 (1853).

[43] W. St. L. & P. R. R. Co. v. McDougall, 126 Ill. 111 (1888).

[44] Earle v. Commonwealth, 180 Mass. 579. In re Board of Water Supply 142 N. Y. S. 83. Laws 1909 N. Y. Ch. 56, Sec. 7.

[45] Braun v. West Side El. R. R. Co. 166 Ill. 434 (1896).

private individuals[46] for damaging property in a similar manner. (2) The court might have adopted the rule, which had been applied and still does apply to partial takings, and defined "damage" to mean the difference between the fair cash market value of the property before and after the infliction of the damage.[47] But the court adopted neither of these rules. The first was rejected because it did not include some kinds of injuries for which there was no common law precedent and the second because this rule would have required payment of compensation for damage of a general character. A middle ground was selected which has been followed rather generally throughout the country. This rule is that compensation is allowed in all cases where there has been some physical disturbance of a right, either public or private, which one enjoys in connection with his property and which gives to it additional value, by reason of which disturbance the owner has sustained a special damage with respect to his property which was not sustained by the public generally.

A railway[48] or tunnel[49] which shuts off access to a street constitutes such special damage. This construction includes all cases actionable at common law, but the non-existence of common law liability does not in itself defeat the constitutional right to compensation.[50] Speculative damage,[51] general damage,[52] such as the community as a whole may sustain, damage which does not arise out of the violation of rights, such as the destruction of switch connections to which the claimant had no right,[53] and damage caused by the exercise of the police power,[54] are not recoverable. The ordinary police regulations which either place a restriction upon the use of property, such as for billboard purposes, or which require the expenditure of money in the interest of the public welfare, such as for making railroad crossings safe, without compensation, are not contrary to the principle adopted by the introduction of the damage clause in the eminent domain provision, because in these cases the damage is of a general and not of a special character, and general damage is not at any time recoverable.

Where property is destroyed under circumstances more nearly resembling special damage, as where animals are killed[55] or buildings destroyed,[56] to prevent the spread of disease, the absence of a constitutional right to compensation is somewhat contrary to the principle embodied in the damage clause of the eminent domain provision. Similarly under the drainage rule of this State, whereby the upper proprietor has an easement of drainage over the lower land of all surface waters that naturally flow in that direction, even though the flow is increased by improved drainage on the upper land, it has been held

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[46] This is the English rule and seems to have been adopted in Arkansas, California, Colorado, Georgia, Texas, Washington and West Virginia.

[47] This construction seems to be placed upon the damage clause in Nebraska and Texas.

[48] Rigney v. Chicago, 102 Ill. 64 (1881) reviews the earlier cases and lays down the rule which has been followed in subsequent cases.

[49] Barnard v. Chicago, 270 Ill. 27 (1915).

[50] Aldis v. Union El. R. R. Co., 203 Ill. 567 (1903).

[51] C. & M. El. Ry. Co. v. Mawman, 206 Ill. 182 (1903).

[52] Frazer v. Chicago, 186 Ill. 480 (1900); I. C. R. R. Co. v. Trustees of Schools, 212 Ill. 406 (1904).

[53] Otis Elevator Co. v. Chicago, 263 Ill. 419 (1914).

[54] C. & N. W. Ry. Co. v. Chicago, 140 Ill. 309 (1892).

[55] Pearson v. Zehr, 138 Ill. 48 (1891).

[56] Sings v. Joliet, 237 Ill. 300 (1908).

that a railroad company, as a lower proprietor, must bear the expense of construction of new bridges made necessary by improved drainage above.[57] The destruction of property under the police power is not a technical taking nor is it damage, because the property is not used by the agency which destroyed it and because, in this kind of case, it may be said that no legal right has been infringed. In such cases property becomes subservient to the public welfare. Any constitutional requirement that damages be paid in such cases might have the effect, in the end, of preventing any action being taken at all where the public welfare required action. A constitutional right to compensation to owners of lower lands for damages caused by improved drainage above would affect a change in a well-established rule of property in this State which has proved, on the whole, to be a proper one. The State is not prevented from making voluntary compensation where it sees fit.

Measure of compensation. The constitutions of 1818 and 1848 each required that "just compensation" be paid for property taken and since the constitution of 1870, this requirement applies also to the damaging of property. In the constitutions of some states the words "adequate", "reasonable", "full", "due", or "fair" are employed, but it does not appear that the use of these words has led to any different construction. As regards a taking, there are three situations: first, where the whole of a tract is taken; second, where a part of a tract is taken and the parcel not taken is injuriously affected; third, where a part is taken, and the part not taken is specially benefited.

(1) Where the whole of a tract is taken, the measure of compensation is the fair cash market value of the property taken. This has been the rule under all three constitutions.[58]

(2) Where a part of a tract is taken and the parcel not taken is injuriously affected, the owner is entitled to the fair cash market value of the part taken plus the difference between the fair cash market value of the part not taken before and after the taking. This rule has been followed under the constitutions of 1818,[59] 1848,[60] and 1870.[61]

(3) Where a part of a tract is taken and the part not taken has been specially benefited, under the constitutions of 1818[62] and 1848,[63] the rule was that the amount which represented the special benefits could be deducted from the fair cash market value of the part taken, and the remainder would be the amount of compensation to which the

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[57] C. B. & Q. Ry. Co. v. People, 212 Ill. 103 (1904); 200 U. S. 561. There is a right to compensation if the water turned upon the railroad company is not such as would in a state of nature ultimately reach its property. People v. C. & E. I. R. R. Co., 262 Ill. 492 (1914); East Side District v. E. St. L. & C. Ry. Co., 279 Ill. 123 (1917).

[58] State v. Evans, 3 Ill. 208 (1840); Haslam v. G. & S. W. R. R. Co., 64 Ill. 353 (1872); Price v. Union Drainage District, 253 Ill. 114 (1911).

[59] State v. Evans, 3 Ill. 208 (1840).

[60] Alton R. R. Co. v. Carpenter, 14 Ill. 190 (1852).

[61] W. St. L. & P. R. R. Co. v. McDougall, 126 Ill. 111 (1888).

[62] State v. Evans, 3 Ill. 208 (1840).

[63] Alton R. R. Co. v. Carpenter, 14 Ill. 190 (1852); Curry v. Mt. Sterling, 15 Ill. 320 (1853).

owner was entitled. If the special benefits to the part not taken equalled or exceeded the market value of the part taken, the owner received no pecuniary compensation. The eminent domain act of 1852 changed this rule and forbade the set-off of special benefits against the value of the part taken and the constitutionality of this act was apparently not questioned.[64] Then came the constitution of 1870 with its new provision requiring the payment of compensation when property had been damaged under color of eminent domain. The primary object of this clause was to give the property owner a right to compensation when no part of his property had been taken, because he was adequately protected when a part had been taken, for in this case, he was paid whatever damage was inflicted upon his remaining land. There is nothing to show that the damage clause was intended to affect any other situation than that where no property was taken. Nevertheless the court held that the effect of the new eminent domain clause was to prevent the set-off of benefits to remaining land against the value of the parcel taken. No reason was given for this decision, the court merely saying: "It was evidently the intent of the framers of the article * * * that the full value of land taken should be paid in money, alone, disregarding all benefits and advantages that might result to that portion of the owner's land not taken. Even if the Act of 1873 would bear the construction contended for (i.e. its similarity to the Act of 1845 under which special benefits were set off against total compensation) the provisions of the constitution must prevail regardless of any act of the legislature. The right to be paid for land condemned, in money, and not in benefits, is guaranteed by the constitution, which it is not within the power of the legislature to take away."[65] This rule has been followed without further question[66] and is applied both to takings by private corporations and by agencies of the state.

This is the rule in Colorado, Georgia, Idaho, Louisiana, Maryland, Montana, Nebraska, New York, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia, West Virginia, and Wisconsin. The reason usually stated for this rule is that the constitution requires payment of compensation to be in money. Benefits therefore cannot be used as a medium of payment, but perhaps behind that lies the notion that anticipated benefits do not materialize even though they be found to exist at the time of trial. The contrary rule obtains in Connecticut, Delaware, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, North Carolina, Pennsylvania, and Vermont, and in the United States Supreme Court, under which benefits to the part not taken may be set off against the value of the part taken.

In the remaining states—Arizona, Arkansas, California, Florida, Iowa, Kansas, North Dakota, Ohio, Oklahoma, South Dakota, and Washington—there are special constitutional provisions which

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[64] Hayes v. Ottawa, etc. R. R. Co. 54 Ill. 373 (1870); Peoria etc. R. R. Co. v. Laurie, 63 Ill. 264 (1872).

[65] Carpenter v. Jennings, 77 Ill. 250 (1875).

[66] Harwood v. Bloomington, 124 Ill. 48 (1888); People v. Burrall, 258 Ill. 509 (1913).

forbid the setting off of benefits to land not taken against the value of the part taken. In Iowa and Oklahoma these prohibitions apply, apparently, to taking both by agencies of the state and by private corporations, but in the other states enumerated, the prohibition against the set-off of benefits applies only to takings by private corporations. In these states, therefore, when property is taken by an agency of the state, benefit to the remaining parcel may be set off. In California, municipal corporations only were allowed to set off benefit against damage, but by an amendment adopted in 1918, the right to set-off benefits was extended to counties. It thus appears that in about half the states, agencies of the state in taking property for public improvements may set off special benefits to the part not taken against the value of the part taken.

The rule in Illinois, forbidding the set-off of benefits to the part not taken against the value of the part of the lot taken, does not prevent the levying of special assessments against the remaining parcel where the condemning authority has the power of levying special assessments, but in Illinois the power to levy special assessments for the construction of local improvements is conferred only upon cities, towns, villages, park districts and drainage districts.[67] The result is that in all cases where property is taken by the State or by any of its agencies, which agencies do not have the power of levying special assessments, such as counties, school districts, or the Department of Public Works and Buildings, property taken must be paid for in full without regard to special benefits to the part of the lot not taken. The effect of the rule forbidding the set-off of benefits, when considered in connection with the provision relating to special assessments, is to discriminate against those agencies which do not possess this power. It would seem that all governmental bodies which possess the power of eminent domain should have the power to set-off special benefits against damage or to accomplish substantially the same purpose by special assessments. If the rule were so as to allow the set-off of benefits, it would then be in accord with the general rule which has always been in force in this state, that as regards the part not taken, viewed separately, special benefits to this parcel may be taken into consideration in determining whether the part not taken has been specially damaged or specially benefited, i.e., in this case benefits are set off against special damage.[68] The allowance of set-off also would be in harmony with the principle of special assessments, but would not be open to all the objections which might be urged against a grant of the power of special assessments to all governmental agencies of the state, for in no case could the amount of the set-off exceed the value of the land taken.

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[67] Constitution, Art. IX, Sec. 9. Park districts may make local improvements by special assessments. Van Nada v. Goedde, 263 Ill. 105 (1914); Art IV, Sec. 31; Drainage districts may levy special assessments.

[68] State v. Evans, 3 Ill. 208 (1840); Curry v. Mt. Sterling, 15 Ill. 320 (1853); West Side Elevated Ry. Co. v. Sticknev, 150 Ill. 362 (1894); Brand v. Union Elevated Ry. Co., 258 Ill. 133 (1913), 238 U. S. 586; Oil Belt Ry. Co. v. Lewis, 259 Ill. 108 (1913).

Medium and time of payment of compensation. As regards the medium of payment the term "just compensation" has been construed to require a payment in money.[69] As above stated, this rule applies always in cases of actual takings. The owner is entitled to be paid in money for the land taken irrespective of benefit to remaining land. Damage to property must also be paid for in money, with the qualification, that elements of special benefit may be set off against elements of special damage to the land, merely for the purpose of ascertaining whether the tract has been specially benefited or specially damaged.[70] In a few states the requirement that compensation be made in money is expressly provided for in the Constitution.[71] In Illinois there has never been any such provisions.

With respect to the time of payment, none of the constitutions of Illinois has contained any express requirement that compensation be made before the taking, but the courts have held, as a matter of construction, that actual payment was a condition precedent to the right to take.[72] Accordingly an attempted taking not preceded by payment will be enjoined,[73] although it is held that after compensation has been ascertained in the condemnation proceedings, the condemning authority may enter into the temporary possession of the premises upon the giving of the required appeal bond.[74] The Attorney General has rendered an opinion that the requirement of prepayment does not apply to takings by the state in its corporate capacity and that in such a case an appropriation by the legislature probably would be sufficient.[75]

Prepayment is not required in most states, the courts construing Constitutional provisions, similar to the Illinois provision, as merely requiring the giving of adequate security for payment. In takings by the state or by any of its agents the courts of other states generally hold that the owner possesses adequate security if he has a right to sue the condemning authority. In takings by private corporations, the right to bring a suit is held to be insufficient. In this case the courts require either a deposit of money in court or the giving of a bond approved by the court. The constitutions of several states contain express provisions relating to the time of payment. Some require prepayment, others require prepayment or security.[76] The constitution of California, which has expressly required prepayment or deposit in all cases, was amended in 1918 by exempting municipal corporations and counties from this provision.

With respect to the damaging of property the rule in Illinois as well as in other states, is that damage may be inflicted without

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[69] Caldwell v Highway Commissioners, 249 Ill 366 (1911).
[70] West Side Elevated Ry. Co. v. Stickney, 150 Ill. 363 (1894).
[71] Ohio, Texas, Vermont, Arkansas, Kansas, South Carolina, Arizona, California, North Dakota.
[72] Caldwell v. Highway Commissioners, 249 Ill. 366 (1911).
[73] Commissioners v. Durham, 43 Ill. 86 (1867).
[74] Mitchell v. I. & St. L. R. R. Co., 68 Ill. 286 (1873).
[75] Opinions, 1917-18, p. 72.
[76] Alabama, Arizona, Arkansas, California, Colorado, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Oregon, South Carolina, South Dakota, Texas, Washington, West Virginia.

making payment in advance. An injunction will not be granted to restrain the infliction of damage.[77] The reason for the rule is that the amount of the damage can not be determined before it has been sustained. In a few states payment must be made before the damage occurs.[78] The express requirement of prepayment, inserted in the eminent domain provision containing the damage clause, may, therefore, have the effect of making mandatory the issuance of an injunction to restrain the infliction of damage until payment is made. There is one important type of case where there is a conflict of authority as to the right to obtain an injunction. Where a railway is constructed upon a public highway the fee of which is in the public, the rule in Illinois[79] and in most states is that an injunction will not be granted to restrain the infliction of the damage, because the injury to the abutting property owners does not constitute a taking, but under the New York[80] constitution, which does not contain the damage clause, the rule was laid down, in the elevated railroad cases, that an injunction will be granted to restrain the construction of the road until compensation is paid — on the theory that the abutting owners had an easement of light and air in the street. Thus the construction of the road amounts to a taking of these easements. In states where the damage clause is found, the abutters on streets, the fee of which is in the public, possess natural rights of access only, interference with which constitutes damage, but does not constitute a taking.

Province of the courts, the legislature and the condemning authority. There has never been any provision in the constitutions of Illinois which expressly makes the question of what constitutes a public use one for judicial determination, but this result has been reached by construction. The constitutions of a few states contain provisions which expressly make the question of what constitutes a public use a question for the courts.[81] The question of the propriety of delegating the power of eminent domain is for the legislative branch.[82] The question of the necessity for a particular taking and the question of the amount of land needed is, in the first instance, for the condemning authority, which is vested with a relatively wide discretion, but its judgment is subject to review by the courts for an abuse of discretion.[83] The questions of necessity are not for the jury. The constitutions of Illinois have never provided that the ne-

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[77] Childs v. Chicago, 279 Ill. 623 (1917); Bond v. Penn. Co. 171 Ill. 508 (1898); Stetson v. C. R. R. Co., 75 Ill. 74 (1874); Doane v. Lake St. El. Ry. Co., 165 Ill. 510 (1897); Aldis v. Union El. Ry. Co., 203 Ill. 567 (1903).

[78] McElroy v. Kansas City, 21 Fed. 257; Brown v. Seattle, 5 Wash 35; Searle v. Leod, 10 S. D. 312; Sala v. Pasadena, 162 Calif. 714; Donovan v. Albert, 11 N. D. 289; Delaware Co. Appeal, 119 Pa. 159.

[79] Doane v. Lake St. El. Ry., 165 Ill. 510 (1897).

[80] Story v. N. Y. El. Ry. Company, 90 N. Y. 122.

[81] Provisions of this character are to be found in the constitutions of Arizona, Colorado, Mississippi, Missouri, Washington, Oklahoma.

[82] Chicago v. Lehman, 262 Ill. 468 (1914).

[83] Chicago v. Lehman, 262 Ill. 468 (1914); Depue v. Banschbach, 273 Ill. 574 (1916).

cessity of a proposed taking should be determined by any authority other than the legislature and the condemning authority, although in the convention of 1869-70[84] the majority of the committee on roads reported in favor of a provision which required the determination of the necessity for the taking of land for private roads to be by jury. A few states have provided, however, that in certain cases the jury shall determine the necessity for a particular taking.[85] The fixing of the amount of compensation is in Illinois for the jury subject to review by the courts as in all other jury cases, except in takings by the state, where other agencies may be authorized by the general assembly to determine the amount of compensation.

The guaranty of jury trial. Trial by jury on issues of compensation in condemnation cases was not guaranteed by the constitutions of 1818 and 1848. The Bill of Rights of the constitution of 1818 did provide, "That the right of trial by jury shall remain inviolate." The constitution of 1848 continued this clause with the addition, "and shall extend to all cases at law without regard to the amount in controversy." In accordance with the rule in other states this general provision was held not to apply to proceedings under the eminent domain clause, because a jury was not guaranteed at common law in condemnation cases.[86]

In the constitutional convention of 1869-70, there seems to have been no debate on the question of providing for a jury trial in condemnation cases, but most of the resolutions pertaining to eminent domain contained this requirement. In some instances the resolution called for a jury of freeholders. As finally adopted the provision read: "Such compensation, when not made by the state shall be ascertained by a jury as shall be prescribed by law." This provision is self-executing.[87]

The guaranty of jury trial on issues of compensation is far from being a universal provision. It is found in the constitutions of Arkansas, Arizona, California, Colorado, Florida, Iowa, Maryland, Missouri, North Dakota, Ohio, South Carolina, South Dakota, Washington, and West Virginia. A jury is guaranteed in cases of appeals from the findings of some statutory tribunal in Alabama, Kentucky, Oklahoma, Pennsylvania.

In takings by a state or its agents a jury is guaranteed in Alabama, Arkansas, Colorado, Florida, Iowa, Kentucky, Maryland (except in Baltimore), Ohio, Oklahoma and Pennsylvania. In states where there is no constitutional requirement of a jury trial it is not common to provide for a jury by statute.

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[84] Debates, p. 713.

[85] Michigan Art. XIII, Secs. 1 and 2, applies to all cases except when made by the state. Wisconsin Art. XI, sec. 2, limits to takings by municipal corporations. New York Art. 1, Sec. 7, and Montana Art. III, Sec. 15, limit the provision to takings for private roads.

[86] Johnson v. J. & C. R. R. Co., 23 Ill. 202 (1859).

[87] Mitchell v. R. R. Co., 68 Ill. 286 (1873).

The constitution of 1870 expressly exempts the state from the guaranty of jury trials. The fixing by commissioners of compensation to owners of land taken for the state house was assumed to be proper in People v. Stuart.[88] The Attorney General rendered an opinion that an armory commission might have exercised the power of eminent domain without a jury had the general assembly so provided but that since it did not so provide, a jury was required by the general eminent domain act.[89] The provision exempting the state from the guaranty of jury trial has been said to extend to all takings by the state in its corporate capacity. The Department of Public Works and Buildings was likewise said, by the Attorney General,[90] to have power to take lands without the intervention of a jury.

A provision exempting the state from jury trial is found in the constitution of New York, but its effect is not the same because the section in that state does not guarantee a jury trial in any case.

The constitutional guaranty of jury trial has been held to render void a section of the drainage act of 1879 which provided that commissioners might determine compensation in lieu of the jury when the court so ordered.[91] But a statute has been held constitutional which makes the finding of the commissioners prima facie evidence as to the amount of compensation.[92] The provision in the drainage act of 1879 which authorized the court to empanel a "jury" of twelve men and to direct them to examine the land, to make out an assessment roll and to grant a hearing on objections after the completion of the assessment of damages and benefits was held unconstitutional,[93] because the hearing thus provided for was not the kind of hearing guaranteed by the constitution. This body of twelve men, functioning in this manner, was not a jury. But it has been held that a jury of six men in justice of the peace courts, under the specific authorization of Art. II, Sec. 5 of the constitution, may properly determine compensation, because the term "jury" as used in the eminent domain clause includes any kind of jury recognized by the constitution, and is not confined to that kind of jury which is guaranteed at common law because a trial by jury was never guaranteed at common law in eminent domain cases.[94]

There have been objections to the jury provision in other states, particularly in condemnation proceedings instituted by municipalities. It is stated that trials are thereby delayed and prolonged, that the expense is increased and that the verdicts are not just to the city.

The state of New York in 1913 added an amendment providing that compensation might be fixed "by the supreme court with or without a jury, but not with a referee * * *" Concerning this provision it was said:

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[88] 97 Ill. 123 (1880).
[89] Opinions of the Attorney General, 1914, p. 153.
[90] Opinions 1917-18, p. 729.
[91] Juvinall v. Jamesburg Drainage District, 204 Ill. 106 (1903).
[92] Chicago, T. T. R. R. Co. v. Chicago, 217 Ill. 343 (1905).
[93] Wabash R. R Co. v. Coon Run Drainage District, 194 Ill. 310 (1901).
[94] McManus v. McDonough, 107 Ill. 95 (1883).

"What is wanted to secure justice to the owner and the city and expedition is the selection of suitable men who shall sit alone, and as far as possible do nothing else. We have tried to accomplish this result in the state of New York by so amending the constitution as to provide that the Supreme Court may make the awards for land taken for public use. We anticipate that one or more judges will be assigned to try cases and perhaps, also appeals from the Tax Commissioners on assessment cases. It would be an ideal condition if certain judges devoted themselves exclusively to these cases, trying some cases where the interest of the city is in a high valuation, and other cases where the interest of the city is in a low valuation."[95]

The consitutions of Illinois have not guaranteed a jury trial on issues of necessity for a particular taking. In the convention of 1869-70, proposed resolutions, relating to the exercise of the power of eminent domain by corporations and relating to the taking of land for private roads, contained provisions guaranteeing trial by jury on this issue, but these proposals were not adopted.[96] The constitutions of a few states guarantee a jury trial on the issue of the necessity for the taking.[97]

Condemnation of land for roads for public and private use. It is generally held that the power of eminent domain does not extend to the taking of land for private roads, because the taking is for private and not a public use. This was the law in this state prior to the adoption of the constitution of 1870.[98]

The constitutions of 1818 and 1848 contained no provision expressly authorizing such takings. In the debates of 1869-70 this matter was the subject of some discussion.[99] The majority of the committee on roads reported in favor of a provision authorizing the opening of private roads, the necessity therefor and the amount of damages to be ascertained by a jury of freeholders. A minority of the committee opposed this resolution upon the grounds that property should never be taken for private use; and, that it was in conflict with the fourteenth amendment to the constitution of the United States. The minority recommended the resolution as it appears in Art. IV, Sec. 30, with the exception that the word "maintaining" was dropped and the word "opening" inserted. The minority were of the opinion that the section, in this form, placed such roads "upon the same ground that the courts have put railroads, for public as well as private use."

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[95] See Report of Conference on City Planning, 1912, p. 95 for a criticism of the jury system in condemnation cases. Lawson Purdy, President of the Department of Taxes and Assessments, New York City, in Proceedings of the Conference on City Planning, 1911, p. 120-121.

[96] Debates, p. 713.

[97] Michigan Art. XIII, Secs. 1 and 2, does not apply to the state. Wisconsin, Art. XI, Sec. 2, applies to takings by municipal corporations. New York, Art. I. Sec. 7, Montana, Art. III, Sec. 15, apply to takings of land for private roads.

[98] Nesbit v. Trumbo, 39 Ill. 110 (1866).

[99] Debates, p. 257.

As finally adopted the provision read: "The General Assembly may provide for establishing and opening roads and cart ways connected with a public road for private and public use."

Similar provisions are found in several states.[100] Legislation has been passed in Illinois under the authority of this section.[101]

Condemnation of land for drainage purposes. The constitutions of 1818 and 1848 did not contain any clause expressly authorizing the condemnation of land for the construction of drains and ditches, nor was any act passed by the general assembly during this period which squarely presented the question of constitutionality under the general eminent domain clause. In other states it had been held that land could be condemned under general eminent domain clauses for the purpose of draining swamp lands.[102] The public purpose was found in the beneficial effect upon public health. In other cases similar acts were sustained on broader grounds. But this doctrine was not uniform. In New York before the drainage amendment was adopted it was held that such an act would not be valid unless the project could be related to the public health.[103]

In the convention of 1869-70 the drainage question came up quite early.[104] A resolution was introduced calling upon the committee on the bill of rights to inquire into the necessity for amending the constitution so as to authorize the enactment of drainage laws applicable to private property. The question was not debated but the committee (doubtless having in mind the decision in Nesbit v. Trumbo,[105] which held invalid an act of the legislature authorizing the condemnation of land for private rights of way and the conflict of authority on this question in other states) reported in favor of inserting such a provision. Accordingly section 31 of Art. IV was inserted. This section provided: "The General Assembly may pass laws permitting the owners or occupants of land to construct drains and ditches for agricultural and sanitary purposes across the lands of others."

This provision was limited to the construction of drains and ditches for the two purposes specified. Since the effect of the clause was to operate as a limitation, there was no power to construct levees as independent projects. Furthermore, the general assembly could not authorize the organization of drainage districts with the power of levying special assessments because Section 9 of Article IX of the constitution limited the exercise of the power of levying special assessments "to cities, towns, and villages." Legislation attempting to authorize the condemnation of land for levee purposes, and the levying of special

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[100] Alabama, Arizona, Colorado, Georgia, Michigan, Mississippi, Missouri, Montana, Oklahoma, New York, Washington, Wyoming. Usually the road is referred to as a private way of necessity, occasionally as a right of way or private road, or a private and public road.

[101] See Hurd's R. S. Ch. 121 Sec. 98.

[102] Tidewater Co. v. Coster 18 N. J. Eq. 518.

[103] In re Ryers 72 N. Y. 1.

[104] Debates, p. 74.

[105] 39 Ill. 110 (1866).

assessments to pay for the improvement, was accordingly held invalid.[106]

In the year following this decision the General Assembly proposed an amendment to remedy the defects in section 31 of Art. IV, which had been disclosed by the decision in Updike v. Wright. This resolution authorized the organization of levee districts, conferred authority to levy special assessments, added mining purposes to those of agriculture and sanitation contained in the original section, and amplified the phraseology generally. The proposed amendment was adopted at the election in November, 1878. This section now provides: "The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State, by special assessments upon the property benefited thereby.[107]

The provisions contained in the general eminent domain clauses apply to proceedings under this section.[108] Damage caused merely by increasing the flow of natural drainage gives no right to compensation.[109]

Corporate franchises and property. Under the constitutions of 1818 and 1848 there was no provision expressly authorizing the taking, under the power of eminent domain, of corporate franchises and property. In the convention of 1869-70 there seemed to have been some fear that the general eminent domain clause would not authorize the condemnation of corporate properties.[110] It was apparently thought that the grant of a franchise might carry with it an obligation not to exercise the power of eminent domain. The court has since held, in accordance with the general rule, that this power cannot be irrevocably bartered away. The breach of an agreement not to exercise the power of eminent domain is not an impairment of the obligation of a contract.[111] But the following provision was inserted: "The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the General Assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity the same as of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the said right of eminent

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[106] Updike v. Wright, 81 Ill. 49 (1876).

[107] Provisions expressly authorizing the condemnation of land for drainage purposes have been adopted in the following states: Arizona, Colorado, Florida, Idaho, Iowa, Missouri, Mississippi, Montana, New Mexico, New York, Oklahoma, South Carolina, Washington, Wyoming.

[108] Wabash R. R. v. Coon Run Drainage District, 194 Ill. 310 (1901).

[109] C. B. & Q. Ry. Co. v. People, 212 Ill. 103 (1904), 200 U. S. 561.

[110] See Debates, pages 262, 703, 713.

[111] Village of Hyde Park v. Cemetery Association, 119 Ill. 141, (1886); Long Island Water Supply Co. v. Brooklyn, 168 U. S. 685.

domain, any incorporated company shall be interested either for or against the exercise of said right."[112]

The general effect of this constitutional clause was the subject of examination in L. S. & M. S. Ry. Co. v. C. & W. I. R. R. Co.,[113] where the court took occasion to say: "The power of eminent domain was conferred upon the general assembly by that clause which vested in that body the legislative power of the state. That power is not granted but it merely recognized by the state by Sec. 13 Art. 2, and the purpose of that section is to limit and regulate its exercise. Sec. 14 of Art. XI was inserted out of an abundance of caution."

This section is also spoken of as "reinforcing" Art. II, Sec. 13.[114]

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[112] Art. XI, Sec. 14. Similar provisions are found in the Constitutions of Alabama, Arizona, Arkansas, California, Colorado, Georgia, Idaho, Kentucky, Mississippi, Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, Virginia, Washington, West Virginia, Wyoming.

[113] 97 Ill. 506 (1881).

[114] Mitchell v. R. R. Co. 68 Ill. 286 (1873).

IV. EXTENSION OF THE POWER OF EMINENT DOMAIN.

Types of constitutional provisions in general. In recent years a number of constitutional provisions have been adopted which extend the power of eminent domain. Uses which heretofore were not generally regarded as public have by this means become public uses. These constitutional provisions fall into three groups: (1) There is a class which adds new functions of government to the state or to its subdivisions but which does not expressly confer the power of eminent domain as one of the means of their accomplishment. The ultimate effect, however, may be to draw the power of eminent domain to the added functions. This class is the most numerous. (2) In the second group, the sphere of government is extended and the power of eminent domain is expressly mentioned as one of the means of effectuating the new purpose. Amendments falling in these two classes comprise a wide range of subjects: conservation of natural resources, forests, reclamation work, internal improvements, municipal ownership of public utilities, state insurance, mining, manufacture of cement, operation of grain elevators and flour mills, sale of necessaries, and building of homes. (3) In the third class of amendments, the power of eminent domain is authorized to be employed in a new direction, but for a purpose distinctly incidental to the accomplishment of other functions, as for example when a city, in the location or widening of streets or in the construction of public works, seeks to condemn land lying outside the proposed improvement for the purpose of further insuring the success of the improvement, or for other collateral objects. The properties taken are not directly and continuously used in the project but are sold after the incidental benefit arising from their temporary possession has been realized.

The first and second classes of constitutional amendments simply expand the power of eminent domain. Constitutional provisions of the third class likewise extend the power of eminent domain but the difference in the objects sought to be accomplished thereby has caused the introduction of the term "excess condemnation" as descriptive of this additional authority.

Constitutional provisions extending state functions. Constitutional provisions recently adopted, which extend state functions but which do not expressly confer the power of eminent domain with

respect to such new functions, relate either to the conservation of natural resources or to the conduct of some business enterprise.

Constitutional provisions authorizing the creation of forest preserves have been in force for some time.[1] In the absence of a constitutional provision authorizing the condemnation of land for the purpose of creating a forest preserve, a statute which confers this power probably would be constitutional. No case has been found which directly presents this question but the purpose might be regarded as analogous to that of public parks. It has been held in Illinois that it is proper to employ the taxing power to maintain forest preserves.[2]

The broader policy of conservation of all natural resources has been adopted in some states. The constitution of Idaho declares that the use of lands for the development of the natural resources of the state or the preservation of the health of the inhabitants shall constitute a public use. By an amendment adopted in 1918, Massachusetts authorizes the condemnation of land for the conservation of natural resources. In 1919 Texas provided for the conservation of natural resources and the creation of conservation districts. The preservation and distribution of water, irrigation, reclamation, drainage, forests, water and hydro-electric power were expressly referred to as being within the objects of the Texas amendment. The power of eminent domain was not expressly mentioned in the Texas amendment. South Dakota has recently authorized the state to invest its funds in, and to lend its credit to, corporations organized for the development of natural resources.

The reclamation of privately owned swamp and arid land is not usually undertaken by the state directly, but express constitutional provisions are common which authorize quasi-public corporations to condemn land for such purposes. There is but slight evidence of a desire to change this policy. Within certain limits, not clearly marked out, the state, under general constitutional provisions, may condemn, reclaim and sell land. The condemnation and reclamation of the Back Bay flats district in Boston harbor by the state was one of the most extensive of such reclamation projects. The statute which authorized this work was held constitutional under the general eminent domain clause,[3] but its validity was made more certain because of its close relation to the promotion of commerce.[4] Condemnation of land on a broad scale in furtherance of a definite policy of state reclamation work could scarcely be attempted in the absence of express constitutional provision.[5] The legislature of the state of Washington at its last session proposed an amendment to be voted on in 1920 which declares that the taking of private property by the state for land reclamation and settlement purposes shall be a public use. An amendment which would have authorized the state to contract indebtedness

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[1] Constitutional provisions relating to forest preserves will be found in Ohio, New York, Wisconsin, Washington, Montana, Idaho and Arizona.
[2] Perkins v. Commissioners of Cook Co. 271 Ill. 449 (1916).
[3] Moore v. Sanford, 151 Mass. 285 (1890).
[4] Opinion of the Justices, 204 Mass. 607.
[5] Cooley, Constitutional Limitations (7th Ed.) Sec. 766.

for the reclamation of wild lands failed of adoption in Arizona in 1914; and a similar proposal increasing the state debt limit for building roads, constructing irrigation and power projects and developing untilled lands, was rejected in Oregon in the same year.

A few constitutional provisions empower the state to enter generally into the construction of works of internal improvement. In some states the power to construct such works is prohibited. But the construction of public roads and the improvement of lands donated to the state are commonly excepted from the prohibition. In this connection mention should be made of the act passed at the 1919 session of the General Assembly of Illinois which grants power to the Department of Public Works and Buildings: "To acquire by condemnation under the eminent domain laws of this state, lands, mines, quarries, gravel beds, clay beds, mineral deposits, or other property for procuring materials or producing manufactured products necessary in the construction and maintenance of public improvements by the state of Illinois;

"To lease, purchase, construct, maintain and operate lands, mines, plants and factories for the production of any raw materials or manufactured products necessary in the construction and maintenance of public improvements by the state of Illinois."[6] Constitutional amendments have been adopted in North Dakota and in South Dakota which authorize the state to engage in works of internal improvement.[7] Wyoming permits the state to engage in works of internal improvement when authorized by two-thirds vote of the people.

The power of eminent domain has been employed in European countries for the purpose of abating insanitary areas, and while it has been discussed to some extent in this country, this policy has not been acted upon. It is unlikely that the courts would sustain, under the general eminent domain clause, a statute which authorized the condemnation of properties for the purpose of changing the character of the neighborhood.[8] The nearest approach to a policy of this character is that contained in the Massachusetts amendment of 1915 which authorizes the state to take land for the purpose of relieving congestion and for providing homes for citizens. A city may, of course, cut wide thoroughfares through an insanitary area; and in states which, by recent amendment, permit the condemnation of land bordering upon an improvement for the purpose of protecting it, a much greater portion of the district could be changed. The employment of the power of eminent domain to abate slum districts has been discussed and proposed,[9] but the great expense and the likelihood that the abatement of one area would merely cause its re-appearance elsewhere has led others to oppose its use.[10]

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[6] Illinois Laws, 1919, p. 712.

[7] South Dakota, 1918, authorizes the State to engage in works of internal improvements and to lend its credit to corporations for this purpose. North Dakota, 1918, authorizes the state or any of its subdivisions to make internal improvements or to engage in any industry not prohibited.

[8] Salisbury Land Co. v. Commonwealth, 215 Mass. 371.

[9] See Proceedings of Conference on City Planning, 1912, p. 100.

[10] Dewsnup, Housing Problems, p. 233; Swan, Excess Condemnation, p. 481.

Constitutional provisions in several states expressly authorize the condemnation and operation of public utilities by municipalities. With respect to the power of a city to condemn existing public utilities, it has been held in New York that a statute enacted under the general eminent domain clause justifies such a taking.[11] The power to condemn public utilities has been conferred upon Illinois cities by an act of 1913.[12] The power to acquire harbors, canals, wharves, levees, and all appropriate harbor structures, elevators and warehouses was delegated to municipalities in the same year.[13] Little doubt could be raised as to the constitutionality of the main features of these acts, but objections might be raised with respect to the provision found in each which authorizes the city to lease to private corporations for a limited number of years the utilities taken over by the city by condemnation proceedings. While the courts elsewhere allow the condemnation of properties in fee and their ultimate sale upon the abandonment of the undertaking, they have refused in other types of cases to permit the taking of land from a private person to be immediately sold or leased to another private person. A constitutional provision in Ohio expressly authorizes the condemnation and leasing of public utilities by municipalities. Other provisions relating to the acquisition and operation of public utilities are to be found in Arizona, California, Colorado, Louisiana, Michigan, Missouri, Oregon and South Carolina.

The power of eminent domain under general eminent domain clauses cannot be employed to aid an enterprise which is not invested with a public interest, nor to aid the state or its subdivisions, when such enterprises are conducted by them.[14] In a number of states there exist constitutional prohibitions upon the granting of aid to private enterprises by the state or municipalities or both. The extension of the functions of government in some states to include the conduct of business enterprises may have the effect of expanding the power of eminent domain. In North Dakota the state has been given the power by constitutional amendment of 1918 to engage in any private enterprise which is not expressly prohibited by the constitution. The state of Oklahoma may engage in any occupation or business except agriculture. In Arizona the state and municipal corporations have the right to engage in any industrial pursuit. In other instances the power is conferred upon the state to engage in certain specified enterprises, such as providing for state insurance against loss by hail in North Dakota and in South Dakota, engaging in mining and the manufacture of cement in South Dakota, in the establishment and operation of grain elevators and flour mills,[15] and in supplying necessaries of life in time of war or other emergency.[16] An amend-

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[11] In re City of Brooklyn, 143 N. Y. 596, affirmed 166 U. S. 685.
[12] Hurd's R. S. 1917, Chap 111A, Secs. 87-101.
[13] Hurd's R. S. 1917, Chap. 24, Sec. 70 et seq.
[14] School v. Coal Co., 118 Ill. 427 (1887) (mining). Banker v. Grand Rapids, 142 Mich. 687, (state cannot condemn land for coal yard or for a plumbing establishment). Keen v. Waycross, 10 Ga. 588; Mather v. Ottawa, 114 Ill. 659 (1885).
[15] South Dakota; North Dakota.
[16] Massachusetts 1917

ment was adopted in Massachusetts in 1915 which authorized the condemnation of land to relieve congestion and to provide homes.[17] At its 1919 session the legislature of Kansas proposed an amendment to be voted on in 1920 which authorizes the creation of a fund to encourage the purchase of farm homes.[18] A proposal to levy a land tax to establish a home-maker's fund was defeated in Oregon in 1916.

Constitutional provisions expressly extending power of eminent domain. Recently adopted constitutional provisions which extend the use of eminent domain relate to the conservation of natural resources, to the acquisition of public utilities by municipalities and to housing projects. The constitutions of Ohio and Wisconsin authorize the taking of land for forest preserves. The conservation of natural resources is declared to be a public use in the constitution of Idaho, and an amendment in Massachusetts in 1918 authorizes the condemnation of land for the conservation of natural resources. A proposal, to be voted on in Washington in 1920, provides for the taking of land for reclamation and settlement purposes. The constitutions of several states authorize the condemnation and operation of public utilities by cities. An amendment adopted in Massachusetts in 1915 authorizes the condemnation of land to relieve congestion of population and to provide homes for citizens.

Excess condemnation—general statement. The problem which is sought to be solved by excess condemnation is primarily a problem of the large city. The city desires a greater control over the character of the neighborhood surrounding public improvements, such as newly opened or widened streets, public parks or buildings, for the purpose of protecting such improvements from undesirable structures and for the more general objects of stabilizing real estate values and insuring the proper development of the district.

First, it is urged that the city be given power to condemn the small remnants of lots which are left as a result of the location or widening of streets, and in addition, the power to condemn a sufficient amount of land which, when added to the remnant, will make suitable building sites. The city is also to be authorized to sell the lot. Second, it is proposed that the city be given power to condemn considerable areas adjoining a public improvement for the purpose of reselling them under proper restrictions designed to protect the improvement and to control the character of the buildings in the section.

[17] This action followed an opinion of the Justices of the Supreme Court, 211 Mass. 624, that such a project was not a public purpose. See also, Salisbury Land Co. v. Commonwealth, 215 Mass. 371, (1913).

[18] Kansas Session Laws, 1919.

Third, it is proposed that the city be authorized to condemn the area surrounding an improvement and to sell the same for the purpose of recouping the cost of the improvement.

Constitutionality of statutes authorizing excess condemnation. The courts of the United States, with practical unanimity, have held unconstitutional under general eminent domain clauses, statutes which authorize the condemnation of more land than is necessary for a proposed improvement, such excess to be later sold or leased. Such a taking is held not to be for a public purpose. As early as 1824 the Supreme Court of South Carolina took this position with reference to a statute which authorized the taking and resale of lot remnants.[19] A few years later a similar statute of New York was held unconstitutional.[20] These two cases had the effect of settling the constitutional question, at least for a time. No statutes of like character are found until 1870, at which time New Jersey passed an act authorizing the replotting of land affected by an improvement so as to absorb the remnants.[21] The act was never tested. In 1904, a remnant act was passed in Massachusetts.[22] A similar one, but with broader powers was enacted in Ohio in the same year, followed by like legislation in Virginia in 1906, Connecticut in 1907, Pennsylvania in 1907, Maryland in 1908, Wisconsin in 1909, New York in 1911, and Oregon in 1913.

The Maryland act came before the court in 1911, and, while the decision is not a square holding against its constitutionality, for the point was not definitely in issue, the language of the opinion points strongly in that direction.[23] Two years later, the Pennsylvania statute was declared unconstitutional.[24] This statute authorized the condemnation and resale under building restrictions of land within 200 feet of a proposed parkway. The object of the taking was to preserve the improvement. There was a slight intimation by the court that the taking of an easement for such a purpose might not be objectionable, but the taking of land to be resold possibly to others was held to promote a private purpose and was therefore void. Proposed legislation of the same nature was for like reasons said to be unconstitutional, in opinions of the justices of Massachusetts, rendered to the legislature in 1910.[25] In its first opinion the court took occasion to remark that the lot remnant act might be sustained, but they stated that this legislation went "to the very verge of constitutionality" and that it could apply only when the particular remnant was too

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[19] Dunn v. City of Charleston, Harpers Law Reports, 189.
[20] In re Albany street 11 Wend. 149, (1834); Emery v. Conner, 3 N. Y. 511, (1850).
[21] New Jersey Laws, Chap. 117 (1870).
[22] Mass. Laws (1904).
[23] Bond v. Baltimore, 116 Md. 683, (1911). See, also, Philadelphia etc. R. Co. v. Baltimore, 121 Md. 504.
[24] Mutual Life Insurance Co. v. Philadelphia, 242 Pa. St. 47 (1913).
[25] Opinions of the Justices, 204 Mass. 604, 204 Mass. 616.

small to be of any practical value and even then only upon an adjudication that the public convenience and necessity required the taking. With the exception of this opinion, no authority has been found which is favorable to the constitutionality of a statute authorizing excess condemnation under a general eminent domain clause. Such judicial authority as there is, is in accord in indicating that if municipalities are to be given the power to condemn land which is not to be used for the purposes of the improvement, but is to be resold for any collateral object whatsoever, such power must be conferred by express constitutional provision. The statutes in other states have not been before the courts, those interested in their use apparently acquiescing in the prevailing judicial opinion.

The question here discussed has never been raised in the courts of Illinois, but in a case[26] decided in 1866 the Supreme Court of Illinois, in holding that a statute which authorized the condemnation of land for private rights of way was unconstitutional, took occasion to quote with approval from the Albany Street case[27] which held the New York lot remnant act void. There is no reason to suppose that the courts of this state would hold such an act valid. Under the existing eminent domain clause it is definitely outside the scope of legislative power to authorize municipalities to condemn and resell lot remnants or take and resell lands for the purpose of protecting an improvement or for improving the character of the neighborhood, or for purposes of recouping the cost of the improvement.

It has sometimes been said that a statute which would authorize the condemnation of easements for the purpose of protecting an improvement or for improving the character of the neighborhood would be constitutional, because this does not involve excess condemnation but only an extension of the power of eminent domain, the authority to resell after the taking being eliminated. But little authority can be adduced in support of this position. The case usually referred in this connection is that of Attorney General v. Williams.[28] In this case an act of the General Court of Massachusetts which authorized the condemnation of easements of light and air above the height of ninety feet surrounding Copley Square in the city of Boston was held constitutional. The limitation of the height of buildings is, however, recognized everywhere as a legitimate exercise of the police power, and the Massachusetts court intimated in this case that payment of compensation would not have been necessary. No case has been found which discusses the broad question whether a statute may constitutionally authorize a city to condemn easements in the form of general building restrictions and annex them to public improvements. The General Assembly of Illinois, however, has acted upon the assumption that such an act is constitutional.[29]

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[26] Nesbitt v. Trumbo, 39 Ill. 110.

[27] 11 Wend. 149 (1834).

[28] 174 Mass 476, 178 Mass. 330, 188 U. S. 491 (1899); Walter L. Fisher, Plan of Chicago p. 148.

[29] Sec. 3 of Art. IV, Act of 1915, providing for the consolidation of the local governments of Chicago authorizes the condemnation of easements to control the surroundings of parks. This act has never gone into effect, because dependent upon a favorable popular vote in Chicago.

Scope of the police power. City plans, rather generally, seek an adequate control over the location and regulation of all offensive industries, of advertising signs, and of ordinary business establishments. Buildings are to be safely constructed, limited to certain heights, and to certain proportions of the lot, and constructed in accordance with established building lines. The display of advertising signs is to be restricted. In planning for undeveloped areas it is sought to prohibit the building within the lines of officially mapped streets. A thoroughgoing zoning system is sought. To what extent are these objects attainable under the police power without express constitutional authority?

The police power is adequate to compel the safe construction of buildings,[30] and to exclude from certain districts any business which is a nuisance and many which are not nuisances per se, such as public wash-houses and the like.[31] In the matter of excluding business establishments from specified areas, the courts probably have not gone farther than in the case of Ex parte Hadacheck.[32] In this case an ordinance was sustained which excluded brick yards from residential districts. Retail stores and similar business establishments cannot be excluded from residence districts.[33]

Nor may the police power be used to control the general character and architecture of a building. The issuance of building permits, conditioned upon the proposed building conforming in size and general character and appearance to the general character of buildings in the neighborhood, is not justified.[34] "A citizen has the common law right to improve his property as his taste, convenience or interest may suggest without considering whether his building will conform to the general character of buildings previously erected", says the court. The compulsory establishment of building lines is not generally within the police power[35] though the recent case of Eubank v. Richmond[36] sustained such an ordinance which allowed the establishment of a building line on request of two-thirds of the property owners in the district affected. This case was reversed by the Supreme Court of the United States[37] but apparently not upon the ground that no building line could be established. The requirement that dwellings be constructed as separate and detached buildings is likewise unreasonable.[38]

The history of billboard regulation is a long one. When the statute merely prescribes the manner of construction the regulation is valid.[39] If the statute prohibits the construction and display of bill-

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[30] Commonwealth v. Roberts, 155 Mass. 281; Health Dept. v. Rector, 145 N. Y. 32.

[31] Ex parte Quong Wo, 161 Calif. 220; Chicago v. Stratton, 162 Ill. 494 (1896); Shea v. Maucie, 148 Ill. 14; People v. Ericsson, 263 Ill. 368 (1914).

[32] 165 Calif. 416, 239 U. S. 394.

[33] People v. Chicago 261 Ill. 16 (1913; Stubbs v. Scott, 127 Md. 86, and State v. Houghton, 134 Minn. 226, though the Minnesota decision was by a bare majority.

[34] Bostock v. Sams, 95 Md. 400.

[35] Fruth v. Charleston, 75 W. Va. 456; Curran v. Guilfoyle, 38 App. Div. N. Y. 82; In re Charleston, 57 App. Div. N. Y. 167; St. Louis v. Hill, 116 Mo. 527.

[36] 110 Va. 749.

[37] 226 U. S. 137.

[38] Byrne v. Maryland Realty Co., 129 Md. 202, (1916).

[39] Gunning Adv. Co. v. St. Louis, 235 Mo., 99; Varney v. Williams, 155 Calif. 318; People v. Ludwig, 218 N. Y. 540; Chicago v. Gunning, 214 Ill. 628 (1905).

boards the regulation is held invalid.[40] The most advanced position on billboard regulation yet taken by any court is the recent decision in Cusack v. Chicago,[41] where an ordinance prohibiting the erection of billboards in residential districts, except upon the written consent of the owners of a majority of the frontage in the block, was sustained. The ordinance was not sustained upon aesthetic grounds. The court finds a relation to public morals and health. Massachusetts has deemed this power inadequate and has attempted to expand the police power by a constitutional amendment of 1918, as follows: "Advertising on public ways, in public places, and on private property within public view may be regulated and restricted by law."

A similar provision was rejected in Ohio in 1912. A statute which imposes reasonable restrictions upon the height of buildings is a proper exercise of the police power.[42]

Cities frequently desire to project new streets into undeveloped territory in anticipation of future needs and to prohibit the erection of buildings within the lines of the proposed street, pending the taking of title. Except in Pennsylvania this has not been allowed under the police power.[43]

There has as yet been no thorough testing of the constitutionality of zoning statutes such as the one which went into effect in New York City in 1916, and in Illinois in 1919.[44] The Illinois zoning law authorizes cities (1) to limit the height of buildings, (2) to limit the bulk of buildings, (3) to limit the intensity of the use of lot areas, (4) to determine the area of yards and open spaces, (5) to restrict the location of trades and industries, (6) to exclude trades and industries from fixed districts, and (7) to establish residential districts from which buildings designed for business may be excluded. The act provides that no ordinance shall deprive owners of existing property of the right to continue the use of the property for the purpose for which it was employed at the time any such ordinance goes into effect. The owners of a majority of the frontage in any district, by written objection, may prevent the enforcement of the ordinance. The Cusack case, sustaining an ordinance prohibiting the erection of billboards in residence districts except upon the written consent of the owners of the majority of the frontage in the block, is a fairly strong authority for the constitutionality of the Illinois act, but it remains yet to be seen whether the courts will extend the rule of that case to justify such regulations as are sought to be authorized by this statute. In Massachusetts it has been assumed, apparently, that the decisions which concern the constitutionality of zoning statutes do not go far enough to make certain the constitutionality of such acts, and accordingly by constitutional amendment of 1918, it was provided that:

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[40] Haller v. Training School, 249 Ill. 436 (1911).

[41] 267 Ill. 344 (1914); 242 U. S. 526.

[42] Welch v. Swasey, 193 Mass. 364, 214 U. S. 91; Cochran v. Preston, 108 Md. 220.

[43] Forrster v. Scott, 136 N. Y. Suppl, 577; Edwards v. Bruorton, 184 Mass. 529; Bush v. McKeesport, 166 Pa. St. 57. See the analysis of the cases bearing on the constitutional limitations on city planning powers in the report of the Conference on City Planning, 1917, p. 199, by Edward M. Bassett, Special counsel to the Zoning Committee, New York City.

[44] Illinois Laws, 1919, p. 262.

"The General Court shall have power to limit buildings according to their use or construction, to specified districts of cities and towns."

It is obvious that the problem of the lot remnant is distinctly one of eminent domain and not of the police power. Assuming the constitutionality of the Illinois Zoning Act, control over the height, bulk, location and area of buildings which are to be erected in the future may be had, to the extent that the owners of the majority of the frontage, in the district affected, consent. The act does not and probably could not authorize the imposition of restrictions upon the architectural style and upon the value of the buildings to be later erected. The act falls short of conferring upon cities such control over building development as may be exercised by a grantor of city lots through restrictive covenants in deeds. Changes in existing properties, and control over the general architectural type of buildings to be erected can probably be accomplished only by the exercise of the power of eminent domain.

List of constitutional provisions authorizing excess condemnation. Constitutional amendments providing for excess condemnation have been adopted in Massachusetts (1911), Ohio (1912), Wisconsin (1912), New York (1913), and Rhode Island (1916). Amendments of a broader character than those actually adopted in New York and Wisconsin were defeated in New York in 1911 and in Wisconsin in 1914. An amendment similar to those adopted in Ohio and Wisconsin failed in California, in 1914, 1915, and 1918. An amendment similar to the ones adopted in Massachusetts, New York, and Rhode Island, failed of adoption in New Jersey in 1915.

V. EXCESS CONDEMNATION.

Lot Remnants. The problem of the lot remnant left by the opening or widening of streets did not present itself acutely in Illinois until the city of Chicago undertook to carry out its extensive program of municipal improvements. Upon the formulation of the city plan several years ago this problem was anticipated, and it was urged that the city should be granted power to condemn lot remnants for the purposes of facilitating their union with adjoining property.[1]

The recent widening of Twelfth Street and Michigan Avenue, and the survey of the proposed Ogden Avenue extension in the city of Chicago present the problem of lot remnants in striking form. The Price property located on Twelfth Street and Wabash Avenue is said to be the most flagrant example.[2] The situation with respect to this property is as follows: The Price property had a frontage of 166 feet on Twelfth Street and 71 feet on Wabash Avenue. The city took 68 feet of the 71 feet on a frontage of 166 feet. This taking left a lot remnant of 166 feet fronting on the widened street with a depth of 3 feet. The loss to the city appears from the following figures. The city paid $204,000 for the 68 feet taken, that is, at the rate of $3,000 per front foot on Wabash Avenue. The Supreme Court held the remnant was damaged and not benefited and for this damage the city paid $9,000, that is $3,000 per front foot. The city, therefore, paid the owner as much for the property which was not taken as it paid for the land taken. Had it been allowed to take this remnant, which it paid for in full, it could have recouped at least a portion of this cost by sale to the owner of the adjoining property.

The city also loses in the amount of the special assessment which can be levied against the property in the rear. In this case the 50-foot lot behind the remnant was assessed $14,200. For the 25 feet nearest Twelfth Street it was assessed $440 per front foot, or $11,000; for the next 25 feet, $128 per front foot or $3,200. Had the remnant been united with the adjoining property, at this rate, such remnant as a part of the other property, would have borne an assessment for benefits of $1,320, instead of a damage of $9,000. As a matter of fact, however, this three-foot strip and the rear property would have been

[1] Legal Aspects of the City Plan, by Walter L. Fisher, in the report on "Plan of Chicago" by the Commercial Club of Chicago.

[2] Chicago Bureau of Public Efficiency, Report on Excess Condemnation, Sept. 1918. This report discusses this problem in Chicago in detail and presents several diagrams showing the size and shape of the remnants which have been left. The Report of the Committee on Taxation of New York on Excess Condemnation contains a number of photographs and diagrams of lot remnants in New York City.

assessed at a rate higher than $440 per front foot, for they could then have been assessed as corner property. The probable increase in the assessment rate over $440 per front foot if it had been corner property appears roughly from a comparison of the assessment on corner property lying to the east and fronting on Michigan Avenue. Here, the whole of the original corner property was taken and a small part of the lot in the rear was taken but there was left to this lot a frontage of 32 feet on Michigan Avenue and a new frontage on Twelfth Street of about the same length, so that it now became corner property. This lot was assessed $1,220 per front foot, or a total of $60,000 as compared with the assessment of $440 per front foot on the lot on Wabash Avenue which was blocked off from the new street by the remnant. Michigan Avenue property is about twice as valuable as Wabash Avenue property at this point. After making this deduction, it appears that the first 32 feet of frontage on Wabash Avenue should have been assessed $30,000. Actually this 32 feet was assessed but $11,500—nothing for the first 3 feet, $11,000 for the next 25 feet and $500 for the remaining 4 feet. The city lost the difference between $30,000 and $11,500, or $18,500, plus the $9,000 paid as damages for the 3-foot strip, making a total loss of $27,500.

The report of the Chicago Bureau of Public Efficiency, from which the above facts are taken, states that 617 feet of frontage of the Michigan Avenue widening, out of a total of 3,000 feet affected, will have depths of from 5 to 14 feet. Approximately one-fifth of the frontage on one side of the Michigan Avenue improvement is thus made up of remnants. The proposed Ogden Avenue extension will leave 93 remnants, with a frontage of approximately 3,300 feet on the proposed new street, too small for building purposes.

From these facts the primary reasons for allowing the condemnation of lot remnants are apparent. There is an unquestionable direct loss to the city. There is also a loss to the property owners in the neighborhood. The history of lot remnants in several cities shows that they are apt to remain in separate ownership for years. They cannot be used for building purposes. The street is thus left in an ugly and irregular appearance. Frequently this condition is accentuated by the use of the small area for billboards or other structures of temporary nature out of keeping with the general character of the neighborhood. The development of the street is greatly retarded and the normal increase in real estate values is checked. The improvement is thus robbed of much of its effectiveness and the general utility of the district is greatly impaired.

It has sometimes been urged that the taking of the remnant is unnecessary because its union with the adjoining property can be brought about through private sale or at most by authorizing the city to buy the strip if the owner is willing. The experience of New York does not justify this hope. The union of the two properties is dependent largely on the price asked for the remnant. The history of such parcels shows that the main obstacle is the wide difference of opinion as to price between the owner of the remnant and the proposed purchaser.

The city, not primarily desiring pecuniary gain from this strip, would be in a much better position to cause the two properties to be united. Where the remnant is owned by several persons having different interests and some of them under disability the obstacles to a private sale are great.

Investigations into the lot remnant problem have led to the conclusion that the city should be given the power to condemn these ill-shaped strips of land.

The Massachusetts Committee on Eminent Domain, which made an exhaustive study of excess condemnation here and in Europe, says in its report, "It often happens that the owners of these remnants, desirous of deriving some income, erect temporary structures, unsuited for proper habitation or occupancy. Such structures are frequently made intentionally objectionable, both in appearance and in the character of their occupancy for the purpose of compelling the purchase of the remnant at exorbitant prices. The result is that a new thoroughfare, which should be an ornament to the city, is frequently for a long period after its construction disfigured by unsightly and unwholesome structures to the positive detriment of the public interests."[3]

The Committee on Taxation of the City of New York, in its report on Excess Condemnation, reaches a similar conclusion. "New York furnishes several 'horrible examples' in cutting new streets through sections already built up without excess condemnation. Excess condemnation would leave the city free to rearrange and subdivide the land fronting the improvement into plots of the size and shape best suited to the proposed development."[4]

The Chicago Bureau of Public Efficiency, in its recent study of this problem, concludes that "If in future projects the difficulties are to be avoided which the city has met in the building of the Michigan Avenue boulevard link and the widening of Twelfth Street, the City must be given a free hand so that it can deal with this problem, rearranging the lots in a block to conform to the new street, thus making them available for building purposes. When remnants are left it is essential if the street is to be developed speedily that such remnants be united with adjoining property under a single ownership so that the combined plots can be made suitable for building sites."[5]

Writers on the question have reached similar conclusions.[6] It will also be noticed from the texts of proposed and adopted constitutional amendments in the appendix that in all of those states, except in New Jersey, where the language of the proposed amendment limited the power of excess condemnation to the taking of remnants, the provision has been adopted.[7]

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[3] Massachusetts House Document 228, (1904), p. 5.
[4] Report, 1915.
[5] Report on Excess Condemnation, Sept. 1918, p. 36.
[6] Flavel Shurtleff and Frederick Law Olmsted, Carrying out the City Plan; Lawson Purdy, Report of the Conference on City Planning, 1911, p. 121; Herbert S. Swan, Report on Excess Condemnation, prepared for the Municipal League, published by the Committee on Taxation of New York; Robert E. Cushman, Excess Condemnation, p. 72; Ernst Freund, Conference on City Planning, 1911 p. 242.
[7] Massachusetts, New York and Rhode Island.

Protection of public improvements. In recent years there has been considerable discussion as to the advisability of conferring upon municipalities the power to condemn land bordering on an improvement, for the purpose of facilitating the city's control over the character of the neighborhood. A new use of the power of eminent domain is sought for purposes which are outside the police power. While the city may, under its police power, reasonably control building heights, and exclude such business concerns from residential districts as livery stables, public garages, brick yards and the like and may exercise a fairly adequate control over billboards, it cannot establish an exclusively residential neighborhood, nor a business district, except in so far as these objects will prove to be attainable under a zoning law such as was enacted in Illinois in 1919. The city, under the police power, cannot impose restrictions upon the general architectural style or value of buildings. The various sections of metropolitan areas are undergoing continual change, with a destructive effect upon the stability of land values and upon the harmony of architectural construction and arrangement. Slum areas develop. Public improvements constructed at great expense may fail to accomplish the objects for which they were designed because their usefulness becomes impaired by changed conditions. Building restrictions inserted in deeds to newly sub-divided property operate as partial correctives where they exist, but the policy behind them is not formulated with respect to the city's needs as a whole.

It has been proposed, therefore, that the city be given power to condemn land which borders upon public improvements such as streets, parks and public buildings and to sell the excess land with restrictions as to the use of the property; the power to be used with respect to developed as well as undeveloped property. There has been virtually no experience in this country in employing the power of eminent domain for this purpose, but it has been used in England with considerable effectiveness during the past twenty years. Constitutional amendments authorizing excess condemnation for this purpose have been adopted in Ohio and Wisconsin, both in 1912; and have failed of adoption in New York and California.

It is argued that the city should have the power to control, within reasonable limits, the character of a district bordering on its own improvements, if it is willing to pay for that privilege. It is urged that the exclusion of inappropriate structures and business establishments in residence districts, or of residences in business districts, the securing of reasonable harmony in architecture, building lines and uses of property steady land values, and benefit property owners and the city economically and from a standpoint of aesthetics. It is also urged that the realization of the full benefit of the improvement would thereby be insured; that the power would be an effective instrument for the rehabilitation of insanitary areas; that public health, morals and welfare would be promoted. Legislative investigative committees and civic bodies have reported in favor of this extension of the power of eminent domain. The Committee on Taxation of the City of New

York has stated that, "American cities have been hampered in effective city plan development and in creating dignified and artistic places by the free and unrestricted use of abutting property by private owners. There is no orderly architectural arrangement. The city should have the power to sell or lease the excess land subject to suitable restrictions."[8]

The Chicago Bureau of Public Efficiency recently said, "Experience in the widening of Michigan Avenue and Twelfth Street, the two initial projects in the carrying out of the Chicago plan, shows not only that distorted and unusable small areas or remnants are left when a street improvement of this character is made, but also that the municipality, having no control over the character of building development along the line of the new street, may find that the usefulness and the value of the improvement, because of the lack of beauty and symmetry in the buildings erected along the new thoroughfare may be greatly lessened, although the community has been put to large expense to make the street adjustment. * * * It [the city] must secure control over building improvements fronting on the newly widened or opened street in order that the desired view, appearance and economic importance of the new thoroughfare may be preserved and the full benefit of the improvement realized." [9]

In his report on the legal aspects of the city plan in 1909, Walter L. Fisher had the following to say with reference to this proposal: "In order to secure the full benefit of a park, boulevard, avenue or other public recreation or resort, some control of the immediate surroundings is indispensable. The municipal authorities need some power to regulate the use of premises within immediate view of the public grounds, so as to prevent advertising, restrict kinds of business, and make appropriate regulation of the heights, manner of construction and location of the surrounding buildings. To that end resort must be had either to the police power or to the power of eminent domain. The police power of the state is not available for merely esthetic purposes and is quite inadequate to the solution of this special problem."[10]

Several writers have likewise put themselves on record as favoring this extension of the power of eminent domain.[11]

The fundamental objection to excess condemnation for the purpose of controlling the character of areas bordering on public improvements is, of course, that the taking amounts to an unjustifiable interference with the rights of private property. It is said that the public welfare does not demand it; that the police power is adequate,[12] and that it is preferable to seek any desired extension of control over the use and location of buildings through the gradual expansion of the police power by judicial decision rather than by abrupt changes in constitutional

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[8] Report on Excess Condemnation.
[9] Report on Excess Condemnation, pp. 35-36.
[10] Plan of Chicago, Commercial Club of Chicago, p. 139.
[11] Flavel Shurtleff, Carrying out the City Plan, p. 137; Robert E. Cushman, Excess Condemnation, p. 116; Herbert S. Swan, Report on Excess Condemnation, p. 19; William Bennett Munro, Principles and Methods of Municipal Administration, p. 91.
[12] Ernst Freund, Conferences on City Planning, 1911, p 242.

principles, upon the theory that gradual changes are more calculated to represent the real desires of the people. It is further urged that the exercise of the police power entails little expense to the public as compared with that which accompanies the taking of property under the power of eminent domain and that it is better to sacrifice the added control which cities would derive from this extension of the power of eminent domain than to adopt a policy which might lead to an era of unfortunate land speculation for cities. Doubtless for these reasons proposed constitutional amendments providing for excess condemnation for these purposes have in some instances failed of adoption, as has been the case in California three times and in New York, although such a constitutional provision has been adopted in Ohio and in Wisconsin.

The amendments which have been rejected have conferred relatively broad powers upon the legislature, and it is likely that the desired objects could have been secured by a more restricted grant of power. The New York and California proposed amendments merely limited the taking of property to that which was "additional, adjoining and neighboring". There was no limitation as to the kind of improvement to which the power applied.

To meet the objections that have been raised to the use of excess condemnation for the purpose of protecting improvements, two proposals have been made. One consists in requiring the city to sell the land, condemned in excess, to its former owner if he wishes to buy it. Only upon his rejection of the offer would the land be offered to the general public. There would seem to be no public advantage in selling land to another when the former owner is willing and able to retake title with the restrictions.

A second proposal, designed to meet some of the objections and at the same time calculated to secure many of the advantages of excess condemnation for the purpose of protecting improvements, seeks to confer upon municipalities the power to condemn easements only in the adjoining land. Under this plan the property owner is protected in his ownership but is restricted in the use of his property. It is further urged that this plan would involve less financial risk to the city. Within certain limits, not well defined, the condemnation of easements could be authorized by statute but any thorough-going plan of control would probably meet with constitutional objection. The recent act in this state providing for the consolidation of the local governments of Chicago, but which has never gone into effect, authorizes the city to acquire easements in lands in the vicinity of parks for the purpose of controlling the surroundings. As to the policy of condemning easements, those who advocate the broader power admit its effectiveness but deny that it goes far enough. As far as undeveloped territory is concerned, the condemnation of easements probably would be adequate but it is contended that this power would not be adequate to protect improvements or to change the character of a district which is already improved.

Recoupment. The proposal has been made to employ the principle of excess condemnation for the purpose of recouping the cost of a public improvement and for intercepting a part of the increment of value added to land as a result of the improvement. The adoption of such a policy is advocated as a substitute for or as supplementary to the common practice in this country of levying special assessments, or the practice in some European countries of imposing increment taxes. It is urged that the city having created this increment of value is entitled to receive it. The economic justification for recoupment is much the same as that which supports a tax on the unearned increment such as is levied in England under the provisions of the Lloyd George budget of 1909.

The principle of recoupment has never been adopted in this country though it has been employed extensively in European countries. In England the practice dates back to the Land Clauses Consolidation Act of 1845, but as a financial measure it has not been a success. Out of fourteen miles of streets widened by the Metropolitan Board of Public Works of London at a cost of $58,859,000 the sale of the surplus land totaled but $26,608,000. A few street improvements have shown a margin of profit. Later improvements put through by the London County Council were, with but few exceptions, not financially successful. The extensive improvements in the city of Paris, during the days of the second empire, showed a like loss. Land to the amount of $259,400,000 was condemned but in 1869 the city had recouped but $51,800,000 from the sale of surplus lands and still had on hand land valued at $14,400,000. Later projects have likewise failed to produce a profit or meet the cost. The experience of Belgium, while in many cases productive of heavy losses, in more recent years has been more successful, particularly in projects which were designed to change the character of slum areas. The levying of special assessments is not common in Europe though it is coming to be looked upon with greater favor.

In this country there is but little enthusiasm shown for the adoption of the principle of condemning land for purposes of recouping the cost of an improvement.[13] The financial risks, apparent from European experience, are deemed too great. The practice of levying special assessments is regarded as preferable. When recoupment is favored at all, it is regarded not as the primary object but as an incident to some other project such as taking of lot remnants or the protection of improvements. In every case in this country where a proposed constitutional amendment has been worded broadly enough to permit the taking of excess land for purposes of recoupment, it has been defeated. This has been the case in New York, Wisconsin, and California, although in the first two states amendments of more limited scope have been adopted.

[13] Committee on Taxation of New York, Report on Excess Condemnation; Chicago Bureau of Public Efficiency, Report on Excess Condemnation; Herbert S. Swan, Report on Excess Condemnation; W. L. Fisher, Legal Aspects of the City Plan; R. E. Cushman, Excess Condemnation Flavel Shurtleff, Carrying out the City Plan.

Analysis of constitutional provisions authorizing excess condemnation. If it be decided to adopt the principle of excess condemnation the following distinct questions are presented:

1. Should the clause be self-executing?
2. Upon what agencies of the state should power be conferred?
3. To what kinds of public improvements should it be applied?
4. How much land in excess should the condemning agency be authorized to take?
5. What interest in the land should be authorized to be taken?
6. What directions should be given as to the disposition of the excess taken?
7. What restrictions should be imposed in the disposition of the excess land?

(1) Self-executing or enabling act. The amendments adopted in Massachusetts, New York, Rhode Island and the amendments which failed of adoption in California and New Jersey are enabling acts. The Ohio and Wisconsin amendments and the amendments defeated in New York and Wisconsin are probably self-executing. An enabling act would be in harmony with other eminent domain clauses and would be preferable. The necessary detailed restrictions could more effectively be worked out by a general legislative enactment.

(2) Upon what agencies should the power be conferred? The various amendments contain the following provisions relating to the character of the agencies upon which the power is conferred. In Massachusetts the power is given to the commonwealth, counties, cities or towns; New York, cities; Ohio, municipalities; Wisconsin, the state or any of its cities; Rhode Island, the state or any cities or towns.

The amendments which were rejected in New York, (1911) conferred the power upon municipal corporations; Wisconsin, (1914) municipal corporations; California, (1914, 1915, 1918), the state, county, city or town; New Jersey (1915), the state, counties, cities, towns, boroughs, or other municipality or any board, governing body or commission.

While the cities are the governmental agents chiefly interested in obtaining the power of excess condemnation, no reasons have been advanced for excluding other governmental agencies from exercising the power. The most comprehensive provision dealing with this matter is contained in the proposed amendment which was defeated in New Jersey in 1915. The purposes for which the power of excess condemnation are to be authorized would affect the question here considered. In any event if the power is to be granted it should be conferred upon all those governmental agencies which may possibly have to deal with the particular problem or problems sought to be solved by the grant of the power of excess condemnation.

(3) Kind of public improvement to which the power is to be applied. There is considerable variation in the amendments which have been proposed or adopted as to the kind of improve-

ment to which the power of excess condemnation is to be applied. In general there are two types of provisions: those which specify in detail the kind of improvement in connection with which the power is to be exercised and those which are phrased generally so as to apply to any public improvement.

The provisions in amendments which were adopted are as follows: Massachusetts, "laying out, widening or relocating highways or streets"; New York, "laying out, widening, extending or relocating parks, public places, highways or streets"; Rhode Island, "establishing, laying out, widening, extending or relocating of public highways, streets, places, parks or parkways"; Ohio, appropriations of property for public use—the provision seems to include all local improvements of municipalities; Wisconsin, establishing, laying out, widening, enlarging, extending and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings.

Proposed amendments which failed of adoption: New York, property taken for public use by municipal corporations; Wisconsin, property taken for public use by municipal corporations; California, any proposed improvement; New Jersey, laying out, widening, extending or relocating parks, public places, highways or streets.

While most of the discussion of excess condemnation concerns the protection of streets and parks, there have been few, if any, reasons given for excluding other public improvements.

(4) Quantity of land authorized to be taken. As to the amount of land which may be taken in excess there are, in general, two types of provisions: those which limit the taking of land to an amount sufficient to form suitable building sites and those which place either no limitation or a very general one on the amount. Amendments in Massachusetts, New York, Rhode Island, and the proposed but defeated amendment in New Jersey restricted the amount to be taken to suitable building sites. The Ohio amendment and the amendment defeated in California in 1918 placed no limitation upon the amount to be taken. In Wisconsin, the amount of land is restricted to lands in and about, along, and leading to, any improvement. Of the amendments which failed: New York restricted the taking of land to those that were additional, adjoining and neighboring; Wisconsin, additional, adjoining and neighboring; California, (1914 and 1915) additional, adjoining or neighboring.

If it is sought to provide for the lot remnant problem only, a provision which limits the taking to an amount sufficient to make suitable building sites is appropriate. If it is sought to authorize the taking of excess land for the purpose of controlling the character of the neighborhood adjoining a public improvement, a provision which does not attempt to place a definite limit on the amount that may be taken would accomplish this object, but such a provision could also be construed as authorizing the taking of land for purposes of recoupment. This result might be avoided if the

clause authorized the sale of the excess only under restrictions appropriate to preserve the improvement, or it might also be accomplished by an unlimited grant or by a grant, limited to the land which was adjoining or neighboring, with the proviso that the amount of land taken in excess be no more in extent than would be sufficient to protect and preserve the improvement. The clause authorizing the sale under restrictions could then be added.

(5) Interest in land to be taken. The majority of amendments make no provisions as regards the interest in land that may be acquired. Ohio authorizes the condemning authorities to appropriate or acquire; Wisconsin, acquire by gift, purchase or condemnation; New York, to take; Massachusetts, take in fee; Rhode Island, acquire or take in fee. The amendments which failed in New York, Wisconsin and New Jersey used the word "take" only. California, (1914, 1915, 1918) "take and appropriate in fee simple under the power of eminent domain." Under the general rule, a fee could be taken under any of these provisions if the legislature so provided. No proposed amendment has undertaken to limit the taking to easements, but the amendment adopted in Rhode Island provides that the person from whom the excess is taken shall have the first right to purchase the land.

(6) Disposition of the surplus. In all the amendments except those which were defeated in New York and Wisconsin, there is a clause authorizing the sale or leasing of the excess land. The Rhode Island provision, which in effect gives the former owner an option to repurchase, would seem to be desirable where the land is taken for the purpose of sale under building restrictions, but not where the land is taken for the purpose of making suitable building sites, for in this case the object of the taking is to bring about a union of two or more properties which are separately owned.

(7) Restrictions as to use. If only such excess land is taken as is necessary to make suitable building sites, it will not always be necessary to resell the excess under restrictions. In those states where the taking is restricted to lot remnants, the usual provision authorizes the sale of the land with or without restrictions. Such provisions are found in the amendments adopted in Massachusetts and Rhode Island. The New York amendment contains no provision dealing with the matter of restrictions, nor do the amendments which were defeated in New York in 1911, Wisconsin in 1914, and in California in 1918. The proposal defeated in New Jersey, which was limited to the taking of lot remnants, provided for sale under reasonable restrictions. Those amendments which authorize the taking of excess land for the purpose of protecting and controlling the character of the neighborhood obviously must contain provisions authorizing the sale of the excess under restrictions. Ohio provides that the surplus may be sold with such restrictions as shall be appropriate to preserve the improvement made; the Wisconsin amendment authorizes the sale of the surplus with reservations concerning the future use and occupation of such real estate so as to protect such public improvements and their environs and to preserve the view, appearance, light, air and usefulness of such public works; the California proposal, defeated in

1913 and 1915, authorized the sale under such terms and restrictions as may be appropriate to preserve or further the improvement made or proposed to be made; the California amendment, defeated in 1918, authorized the sale under such procedure as is prescribed by law. Amendments defeated in New York and in Wisconsin contained no provisions relating to restrictions. For simplicity and clearness the Ohio provision seems preferable, but there should be added to it a provision which will give to the former owner the first right to repurchase.

VI. CONCLUSION.

Changes introduced by the Constitution of 1870. The constitutions of 1818 and 1848 contained but one clause dealing with the power of eminent domain. This provision required the payment of just compensation when property was taken for public use. Several changes were introduced in the constitution of 1870: (1) The right to compensation was extended to cases where property was merely damaged for public use. This action has since been followed by about half of the states. (2) As a second result of this change the court has held that where a part of a tract of land has been taken and the remainder part has been specially benefited, the amount of this special benefit cannot be set off against the value of the part taken, thus changing the constitutional rule as it was under the constitutions of 1818 and 1848. As applied to private corporations this is the general rule in other states, but in about half of the states, in takings by the state or by other governmental agencies, special benefits to the part of a tract not taken may be set off against the value of the part taken. It has been urged that this rule should be changed primarily in the interest of all governmental agencies which do not possess the power of levying special assessments, i. e., all agencies other than cities, towns, villages, park districts and drainage districts. (3) Jury trial to determine compensation was for the first time guaranteed in the constitution of 1870. The state is exempted from this provision but it does apply to all other governmental agencies. Similar provisions are found in about one-third of the states, but in most of these states the provisions do not apply to governmental agencies. The provision has been the subject of some criticism in other states. (4) The constitution of 1870 provided that the fee of land taken for railroad tracks should remain in the owner. This provision is found in the constitutions of but three other states. Since the abandonment of an easement causes the property to revert to the owner of the fee, it has been urged that this provision should be eliminated and that the roads be given power to condemn the fee in lands. One unfortunate effect of the existing provisions is that in the carrying out of general municipal improvement plans, railroads cannot be induced nor compelled to relocate their tracks where a relocation would be desirable. There is no other constitutional limitation upon the power of the general assembly to condemn the fee, but the Supreme Court has held that a statute which in general terms grants the power to condemn land does not authorize the taking of a fee. The inference is that the general assembly has power to authorize the taking of the fee but there never has been any express holding in this state that the fee may be taken. There is a

possibility that the Supreme Court may construe the eminent domain clause in the constitution as preventing the taking of a fee unless the court finds, in the particular case, that a fee is necessary. (5) A separate section was inserted in the constitution of 1870 which authorizes the condemnation of the property and franchises of corporations and which guarantees a jury trial on the issue of compensation in proceedings by and against corporations. This provision is found in several states but the Supreme Court of Illinois has said that this provision adds nothing to the general eminent domain clause. The elimination of this clause, however, might be construed as affecting the law in some way. (6) The taking and damaging of lands for drainage purposes was authorized by a separate provision in the constitution of 1870. The clause was later amended so as to authorize the organization of drainage districts, and the levying of special assessments to pay the cost of such improvements. Similar provisions are found in the constitutions of about one-third of the states; in many others the same result is attainable under the general eminent domain clause. (7) A special provision was inserted in the constitution of 1870 which authorized the taking of land for roads for public and for private use. It had been held, under the constitution of 1848, that the taking of land for a private road was not a public use and that a statute which authorized such a taking was unconstitutional. Similar provisions are found in several states.

Construction placed upon other features of the eminent domain clause. (1) Property is taken for public use when it is taken by an agency of the state and actually employed by it in the discharge of governmental functions. It is also taken for public use when the property so acquired is made available for actual use, by the public or by a relatively large group of persons, under governmental supervision, in a manner which is in furtherance of an otherwise legitimate governmental function exercised in the interests of the general welfare. Public parks furnish an illustration. Property is also taken for public use when it is actually employed by private persons in connection with enterprises in which the public possesses such an interest that the law is justified in imposing upon them the duty to serve all upon conditions prescribed by law. The taking of property by public service companies is justified on this ground. Property is also taken for public use when it is actually employed by private persons in some private enterprise, not a public utility, but which is of a nature that the interests of the public are thereby promoted. The taking of land which is both for private and public use as a road and the taking of land for drainage purposes fall within this group, although the power to take in these cases is based on express provisions of the constitution of Illinois. Generally speaking, the term "public use" as used in the general eminent domain clause does not include such purposes.

(2) Property already devoted to public use may be taken for other public uses. It is for the law-making body to declare under what circumstances such property may be taken for other uses. Under a general grant of the power of eminent domain the courts hold that property already devoted to public use may be taken only when the new use will be a different use. Except in the typical cases of the projection of railways across streets and other railways and of streets across railways, the courts are strongly inclined to hold that a general grant of power to condemn does not authorize a taking of property already devoted to public use.

One situation in this state calls for special mention. In the case of South Park Commissioners v. Ward,[1] the court held that an act of the General Assembly was unconstitutional which expressly authorized the South Park Commissioners to condemn the rights of property owners along Michigan Avenue, to have Grant Park kept free from buildings, which rights were acquired under a dedication to public use of the land comprising Grant Park under restrictions imposed by the dedicators—the Canal Commissioners and the United States—and accepted by the City of Chicago; the statute also authorized the South Park Commissioners to permit the construction, in the park, of any museum then located in a public park. The decision was strongly dissented from by three members of the court. Some commentators upon the case justify the decision upon the ground, (a) that the state had no power to rid itself of these restrictions because they were imposed by the United States; and (b) it is possible that the decision means that a governmental agency cannot be authorized to condemn land for the purpose of aiding a private corporation, the Field Museum, which did not itself possess the power of eminent domain. The decision was not based upon either of these grounds. Other comments upon the case are to the effect that it is without precedent in the law of eminent domain. The importance of the case lies in the fact that the decision may be interpreted as meaning that in all cases where property is dedicated to public use under restrictions and accepted by the state or by any of its agencies, the state is powerless to remove the restrictions, even though the necessity therefor may have ceased because of changed conditions. Such a result as this might often prove to be an obstacle of a serious nature.

(3) A taking of property includes the taking of the fee and of easements in land; the imposition of additional servitudes upon land; easements in which, for specified purposes, have been previously acquired; the taking of riparian rights; the removal of support of land, and all direct physical injuries to the property, such as the overflowing of lands. When part of a tract is taken and the remaining part is injuriously affected, the consequential injury constitutes a taking. These rules have remained substantially unchanged under all three constitutions and are practically the same as in other states.

(4) The damaging of property consists in the infliction of special injury to rights, usually of a non-physical character, the effect, in

[1] 248 Ill. 299; (1911).

general, being to impose liability for the damaging of property for public use to the same extent as is imposed upon private persons at common law for causing similar injuries. There is no right to compensation for speculative damage or for general damage, such as is sustained by the community in common, or for the destruction or damaging of property under the police power. Damage inflicted under the police power is usually of a general character and therefore no right to compensation exists, or where special, as in the case of the killing of diseased animals, there is no constitutional right to compensation on the theory that no right, which is superior to the public needs, has been infringed. These rules are practically the same in other states where the damage clause is found in the eminent domain provision.

(5) The measure of compensation in case of a taking is the fair cash market value of the property taken.

(6) The measure of compensation where part of a tract is taken and the part not taken is damaged, is the fair cash market value of the part taken, plus the difference between the fair cash market value of the part not taken before and after the taking.

(7) The measure of compensation when part of a tract is taken, and the part not taken is specially benefited, is the fair cash market value of the part actually taken. The special benefit cannot be set off against the value of the part taken. Under the constitutions of 1818 and 1848 such special benefit could be set off. The rule in most states, either as a matter of construction or of special constitutional provision, is that, in takings by governmental agencies, special benefit may be set off against the value of the part taken. It has been argued in this state, that, in as much as all governmental agencies do not possess the power of levying special assessments, the rule in Illinois should be changed so as to allow the set-off of benefits by governmental agencies.

(8) Where part of a tract is taken, the elements of special benefit to the part not taken may be considered as against special damage to such part in order to determine whether the parcel not taken has been specially damaged or specially benefited.

(9) Where no property has been taken and where the right to compensation is based on the ground that the property has been "damaged", elements of special benefit may also be taken in consideration, i.e. set-off against special damage, in determining whether the tract has been damaged.

(10) A taking of property will be enjoined until compensation is paid, although after compensation has been ascertained in the condemnation proceeding, the condemning authority may enter into the temporary possession of the premises upon giving the required appeal bond. This rule has always been in force in Illinois, although none of the constitutions have expressly required prepayment. The Attorney General has ruled that this requirement does not apply to takings by the state in its corporate capacity. The rule in most states where there exists no express provision on the subject is that the giving of security is alone sufficient to justify a taking. A right to

sue the state or other governmental agency is usually deemed an adequate security in other states, but in takings by private corporations a deposit of money in court or the giving of a bond approved by the court is required. In many states there are special constitutional provisions relating to the time of payment. A few states require prepayment in all cases. A greater number require prepayment only in takings by private corporations. Several states require either prepayment or deposit, or prepayment or security.

(11) The damaging of property will not be enjoined. There is no constitutional right to prepayment. The owner is remitted to his action at law to recover compensation after the damage has been inflicted. In New York and a few other states it is held that the construction of an elevated railroad upon a public street, the fee of which is in the public, amounts to a taking of the abutters' easements of light and air in the street and that therefore the construction of the road will be enjoined until compensation is made. In Illinois and most states the construction of a road under these circumstances does not amount to a taking, but constitutes damage merely. The abutting owners' remedy is in these states an action for damages after the injury has been sustained.

(12) Except in so far as special benefits may be set off against special damage to parcels of land not taken, compensation must be in money.

(13) The determination of what constitutes a public use is for the courts. The question of the propriety of delegating the power of eminent domain is for the legislative branch. The question of the necessity for and of the amount of a particular taking is, in the first instance, for the condemning authority in which is vested a wide range of discretion, but this discretion is subject to review by the courts. In a few states there exist constitutional provisions which make the question of the necessity for a taking one for the jury.

Extension of the power of eminent domain. In recent years a number of constitutional provisions have been adopted which extend state functions. In many instances the power of eminent domain is not expressly conferred, in others this power is designated as a means of accomplishing the new objects. These provisions, in general, relate to the conservation of natural resources, to the conduct of certain types of business enterprises, and to the accomplishment of objects which are generally the subject of police regulations only. Constitutional provisions which expressly authorize the use of the power of eminent domain relate to the conservation of natural resources, the acquisition of public utilities by cities and to housing projects.

Excess condemnation. The proposal has been made to confer upon agencies of the state, chiefly municipalities, the power to

condemn land in excess of that actually needed for the purpose of a particular improvement. The power of excess condemnation, as thus defined, in general, may be employed with three distinct objects in view.

(1) The power may be exercised in connection with the opening or widening of streets to condemn an amount of land lying outside the new street sufficient to make suitable building sites which may front on the new thoroughfare. Lot remnants, which are invariably left in such cases, are thus united with the property in the rear. The history of the lot remnant problem shows that in the majority of instances the lot remnant when left in private ownership will not be promptly attached to the rear property. The result is that the usefulness of the street is greatly impaired. The practice of condemning such areas is common in Europe. The power to condemn land in excess, in this country, cannot be granted by statute. Constitutional amendments conferring the power have been adopted in Massachusetts, Ohio, Wisconsin, New York and Rhode Island. A proposed amendment of this character failed of adoption in New Jersey. The city of Chicago is chiefly interested in this proposal. Civic bodies in Chicago strongly urge its adoption. Where this question has been investigated by legislative committees or by individuals the conclusions reached have been favorable.

(2) It is also proposed to employ the power of excess condemnation for the purpose of controlling the character of neighborhoods surrounding a newly constructed improvement. In connection with the opening or widening of streets, the construction of public buildings and the laying out of parks, the proposal is to allow the city to condemn areas of land abutting on such improvements, and after taking the land in fee the property is to be sold to private persons under restrictions in the deeds. The size, type, location, and use of buildings in the area taken over are thus to be made subject to the control of the condemning authority. Constitutional amendments which authorize this use of the power of eminent domain have been adopted in Ohio and Wisconsin, but such proposals have failed of adoption in California and New York. In all of these cases the amendments were so drafted as to authorize a taking beyond that which was actually necessary for the accomplishment of the objects sought. The use of eminent domain for this purpose is common in Europe. Commissions in this country which have investigated this aspect of excess condemnation generally favor it. Individual writers usually take the same position, though it is thought by some that the power would not be properly exercised, that it would be too uncertain a financial venture for the city, and that the police power is adequate.

(3) The proposal has also been made to employ excess condemnation for the purpose of recouping the cost of improvements. Land which had been or would be enhanced in value by reason of the improvement would be taken over by the city and later sold for the purpose of meeting the cost of an improvement or for the

purpose of making a profit. The policy of condemning land for purposes of recouping cost has never been adopted in this country. It has been used extensively in European countries, but has not proved to be a financial success. Generally, the city has lost money on such ventures. The property taken over has not sold for as much as was anticipated. The practice of levying special assessments is not common in Europe, but this method of meeting the cost of public improvements is being looked upon with greater favor. In this country, where the practice of levying special assessments has proved to be a success, the use of excess condemnation for recouping cost is not favored. The financial risk is deemed too great. In every state where a proposed constitutional provision has been worded broadly enough to authorize the taking of land for resale for the purpose of intercepting the increment of value added by the improvement, the proposal has been defeated.

APPENDIX NO. 1. REFERENCES.

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APPENDIX NO. 2. ILLINOIS EMINENT DOMAIN PROVISIONS.

Art. II, Sec. 13. Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners, subject to the use for which it is taken.

Art. IV, Sec. 30. The general assembly may provide for establishing and opening roads and cartways, connected with a public road, for private and public use.

Art. IV, Sec. 31. The general assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts, and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby. (As amended, 1878).

Art. XI, Sec. 14. The exercise of the power and the right of eminent domain shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity the same as of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right.

APPENDIX NO. 3. CONSTITUTIONAL AMENDMENTS EXTENDING POWER OF EMINENT DOMAIN.

1. Massachusetts.

Amendment of 1911, Art. XXXIX of Amendments. The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the Commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street; provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

Amendment of 1915, Art. XLIII of Amendments. The general court shall have power to authorize the commonwealth to take land and to hold, improve, subdivide, build upon and sell the same, for the purpose of relieving congestion of population and providing homes for citizens; provided, however, that this amendment shall not be deemed to authorize the sale of such land or buildings at less than the cost thereof.

Amendment of 1918, Art. XLIX of Amendments. The conservation, development and utilization of the agricultural, mineral, forest, water and other natural resources of the commonwealth are public uses, and the general court shall have power to provide for the taking, upon payment of just compensation therefor, of lands and easements or interests therein, including water and mineral rights, for the purpose of securing and promoting the proper conservation, development, utilization and control thereof, and to enact legislation necessary or expedient therefor.

Art. L. of Amendments. Advertising on public ways, in public places, and on private property within public view may be regulated and restricted by law.

Art. LX of Amendments. The general court shall have power to limit buildings according to their use or construction to specified districts of cities and towns.

2. New York, 1913.

Art. 1, Sec. 7. The legislature may authorize cities to take more land and property than is needed for actual construction in the laying

out, widening, extending or relocating parks, public places, highways or streets; provided, however, that after the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased.

3. Rhode Island, 1916.

Art. XVII of amendments. The general assembly may authorize the acquiring or taking in fee by the state, or by any cities or towns, of more land and property than is needed for actual construction in the establishing, laying out, widening, extending, or re-locating of public highways, streets, places, parks or parkways: Provided, however, that the additional land and property so authorized to be acquired or taken shall be no more in extent than would be sufficient to form suitable building sites abutting on such public highway, street, place, park or parkway. After so much of the land and property has been appropriated for such public highway, street, place, park or parkway as is needed therefor, the remainder may be held and improved for any public purpose or purposes, or may be sold or leased for value with or without suitable restrictions, and in case of any such sale or lease the person or persons from whom such remainder was taken shall have the first right to purchase or lease the same upon such terms as the state or city or town is willing to sell or lease the same.

4. Ohio, 1912.

Art. XVIII, Sec. 10. A municipality appropriating or otherwise acquiring property for public use may in futherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired, for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law.

5. Wisconsin, 1912.

Art. XI, Sec. 3a. The State or any of its cities may acquire by gift, purchase, or condemnation lands for establishing, laying

out, widening, enlarging, extending and maintaining memorial grounds, streets, squares, parkways, boulevards, parks, playgrounds, sites for public buildings, and reservations in and about and along and leading to any or all of the same; and after the establishment, lay out, and completion of such improvements, may convey any such real estate thus acquired and not necessary for such improvements, with reservations concerning the future use and occupation of such real estate, so as to protect such public works and improvements, and their environs, and to preserve the view, appearance, light, air, and usefulness of such public works.

APPENDIX NO. 4. PROPOSED AMENDMENTS REJECTED BY PEOPLE.

1. New Jersey, 1915.

The legislature may authorize the state, or counties, cities, towns, boroughs or other municipalities, or any board, governing body or commission of the same, to take more land and property than is needed for actual construction in the laying out, widening, extending or re-locating the parks, public places, highways or streets; provided, however, that the additional lands and properties so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street, after so much of the land or property taken has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased and reasonable restrictions imposed.

2. California, 1913, 1915, 1918.

The State or any county, city and county or incorporated city or town, taking or appropriating property within the limits thereof for public use for any proposed public improvement may also take and appropriate under the power of eminent domain, additional, adjoining or neighboring property within the limits thereof, in excess of that actually to be devoted to or occupied by the proposed improvement, and such additional land so taken shall be deemed to be taken for public use. The estates in such additional property so taken shall be a fee simple estate, and such additional property may be sold, leased or otherwise disposed of in whole or in part, under such terms and restrictions as may be appropriate to preserve or further the improvement made or proposed to be made. For the purpose of acquiring, constructing, enlarging or improving a public park, playground, boulevard, street, building or ground therefor, any county, city and county, incorporated city or town may condemn lands outside of its boundaries and within the distance of ten miles therefrom, provided that no land within any other county, city and county, incorporated city or town shall be taken without the consent to be given in any manner that may be provided by law. The conditions under which such additional property may be taken or appropriated, the means and method of providing payment therefor and the terms and restrictions under which such property may be sold, leased, or otherwise disposed of shall be prescribed by general law.

1918 proposal, Sec. 20: The State, any county, city and county, or municipality may acquire, by eminent domain, the title in fee simple to property in excess of that actually needed for an improvement. Property so acquired in excess of that actually needed for such improvement, shall be deemed to be acquired for a public use. The procedure for such acquisition and the use, sale and lease or other disposition of property so acquired shall be prescribed by general law.

3. New York, 1911.

When private property shall be taken for public use by a municipal corporation, additional, adjoining and neighboring property may be taken. Property thus taken shall be deemed taken for a public use.

4. Wisconsin, 1914.

When private property shall be taken for public use by a municipal corporation, additional, adjoining and neighboring property may be taken. Property thus taken shall be deemed taken for a public use.

APPENDIX NO. 5. AMENDMENTS PROPOSED IN, BUT NOT SUBMITTED BY, LEGISLATURES.

1. Massachusetts, 1914.

For the purpose of establishing parks, public reservations, wharves, and docks the general court may by special acts authorize the taking by the commonwealth, or by a county, city or town, or by a commission authorized by a special act of the general court, of more land than is needed for the actual construction of such parks, reservations, wharves, or docks provided the land and property authorized so to be taken are specified in the act; and after so much of the land or property has been appropriated for such parks, reservations, wharves, or docks as is needed therefor, the commonwealth, county, city, town or commission, as the case may be, may hold, lease, sell or use, with or without restrictions, the remainder thereof.

2. Pennsylvania, 1915.

The State, or any municipality thereof, acquiring or appropriating property or rights over or in property for public use, may, in furtherance of its plans for the acquisition and public use of such property or rights, and subject to such restrictions as the legislature may from time to time impose, appropriate an excess of property over that actually to be occupied or used for public use, and may thereafter sell or lease such excess, and impose on the property so sold or leased any restrictions appropriate to preserve or enhance the benefit to the public of the property actually occupied or used.

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